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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NATIONAL TREASURY EMPLOYEES UNION, *et al.* and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, *et al.*,

Petitioners,

v.

RONALD REAGAN, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

1. Did the court of appeals err in holding that the Federal Pay Comparability Act's alternative pay provision is not an unconstitutional delegation of legislative authority where, absent the check of the Act's one-House veto, the President has uncircumscribed authority to set federal pay at whatever level he chooses?

2. Did the court of appeals err in severing the Federal Pay Comparability Act's unconstitutional one-House veto provision from the Act's alternative pay plan provision to which it is expressly attached?

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OPINIONS BELOW

The opinion of the court of appeals is reported at 806 F.2d 1034 (App., *infra*, 15a). The opinion of the district court is reported at 629 F.Supp. 762 (App., *infra*, 1a).[1]

JURISDICTION

The judgment of the court of appeals was entered on December 2, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] In both courts below, the two cases which are the subject of this petition were consolidated.

STATUTORY PROVISIONS INVOLVED

This case concerns the Federal Pay Comparability Act of 1970, 5 U.S.C. 5301 *et seq.* The pertinent provisions are 5 U.S.C. 5301, 5305 and 5306. (App., *infra*, 30a, 37a).

STATEMENT

A. Statutory Background

The Federal Pay Comparability Act of 1970 (hereinafter "Pay Act" or "Act") provides for the annual adjustment of the pay rates of federal employees in statutory pay systems. The Act declares that pay rates should be adjusted so that they are "comparable with private enterprise pay rates for the same levels of work." 5 U.S.C. 5301(a)(3). (App., *infra*, 30a).[2]

The Act establishes a mechanism for determining the size of the pay adjustment needed to ensure comparability with private sector pay rates. The Act requires the President to appoint a Pay Agent who prepares an annual report comparing salaries of federal employees with salaries of private sector employees and recommending appropriate adjustments in federal salaries. 5 U.S.C. 5305(a)(1). (App., *infra*, 31a). The Pay Agent submits the report to the President and also to a presidentially appointed Advisory Committee on Federal Pay. The Advisory Committee reviews the report and makes further recommendations to the President. 5 U.S.C. 5306. (App., *infra*, 37a).

After considering the Pay Agent's report and the Advisory Committee's recommendations, the President is required to adjust federal employees' pay in accordance with the principles of the Act, one of which provides for

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[2] The Act thereby re-enacted the principle of comparability earlier established in both the Federal Salary Reform Act of 1962, Pub. L. No. 87-793, 76 Stat. 832 (hereinafter "1962 Act"), and the Federal Salary Act of 1967, Pub. L. No. 90-206, 81 Stat. 624 (hereinafter "1967 Act").

pay comparability with the private sector. 5 U.S.C. 5301 (a) (3). (App., *infra*, 30a). The pay adjustment becomes effective without any further congressional action in the first pay period beginning on or after October 1 of the applicable year. 5 U.S.C. 5305(a) (2). (App., *infra*, 31a).

The Act also includes an exception to the general rule of annual pay comparability adjustments. If, because of a "national emergency, or economic conditions affecting the general welfare," the President considers it "inappropriate to make the pay adjustment required" by the statute, the President may prepare and transmit to Congress such an "alternative plan with respect to a pay adjustment as he considers appropriate, together with the reasons therefor," in lieu of a comparability adjustment. 5 U.S.C. 5305(c) (1). (App., *infra*, 33a).

Section 5305(c) (2) expressly stipulates that the President's alternative pay plan may not become effective until at least 30 days after transmittal. (App., *infra*, 33a). The Act provides that during this period the alternative pay plan is subject to veto by either House of Congress. Thus, the veto provision expressly limits and exclusively applies to Congress' decision to delegate to the President the power to propose an alternative pay plan. This is the only legislative veto provision found in the Act. The Pay Act contains no severability clause.

If the congressional veto is not exercised, the President's alternative plan becomes effective on the first day of the first applicable pay period commencing on or after October 1 of the applicable year. 5 U.S.C. 5305(c) (2). (App., *infra*, 33a). But if either House disapproves the alternative pay plan, the President must adjust pay in accordance with the Act's comparability principles. 5 U.S.C. 5305(m). (App., *infra*, 36a).

B. Proceedings Below

The petitioners National Treasury Employees Union (NTEU) and American Federation of Government Employees, AFL-CIO (AFGE) are labor organizations (Unions) which represent approximately 120,000 and 700,000 federal employees, respectively. This case arose when the Unions and individual members challenged in class actions the constitutionality of the alternative pay plan section of the Pay Act, and the President's authority to implement such plans, after President Reagan sent to Congress an alternative pay plan for fiscal year 1984. AFGE's suit ultimately involved alternative plans for fiscal years 1980, 1981, 1983, and 1985.[3] NTEU's suit

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[3] Under the Pay Act's statutory scheme, in 1979 the President, acting pursuant to Section 5305(c), transmitted to Congress an alternative plan with respect to a pay adjustment for General Schedule employees for fiscal year 1980 ranging from 7.0% to 9.89%, and averaging 7.02%, above the rates of pay in effect on September 30, 1979. The plan, which was in lieu of an average comparability increase of 10.4% recommended by the Pay Agent, became effective under Executive Order No. 12165, October 9, 1979, 44 F.R. 58671, on the first day of the first applicable pay period commencing on or after October 1, 1979, and continued in effect until September 30, 1980. (App., *infra*, 4a).

Again, in 1980 the President transmitted to Congress an alternative plan with respect to a pay adjustment for General Schedule employees for fiscal year 1981 ranging from 9.1% to 10.41%, and averaging 9.1%, above the rates of pay in effect on September 30, 1980. The plan, which was in lieu of an average comparability increase of 13.5% recommended by the Pay Agent, became effective under Executive Order No. 12248, October 16, 1980, 45 F.R. 69199, on the first day of the first applicable pay period commencing on or after October 1, 1980, and continued in effect until September 30, 1981. (App., *infra*, 4a, 5a).

Similarly, in 1982 the President again transmitted to Congress an alternative plan with respect to a pay adjustment for General Schedule employees for fiscal year 1983 of 4.0% above the rates of pay in effect on September 30, 1982, which was in lieu of an average comparability increase of 18.47% recommended by his Pay Agent. The plan became effective under Executive Order No. 12387,

challenged the alternative plan for fiscal year 1985.[4]

Throughout this litigation all parties have agreed that under *Immigration and Naturalization Service* v. *Chadha*, 462 U.S. 919 (1983), the one-House veto provision of the Pay Act is unconstitutional. The parties focused, therefore, on whether the one-House veto could be severed from the Act and, if so, which provisions of the Act could survive after severance.

Before the district court, the Unions maintained that the Pay Act's legislative veto could not be severed from the alternative pay plan provision to which it is expressly attached. Petitioners argued that to leave the alternative pay plan intact, without the check of the veto, would thwart the central objective of the Act: comparability of federal and private sector pay. The district court, however, agreed with the government that the one-House veto provision was severable from the alternative pay

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October 8, 1982, 47 F.R. 44981, on the first day of the first applicable pay period commencing on or after October 1, 1982, and continued in effect until September 30, 1983. (App., *infra*, 5a).

On August 30, 1984, President Reagan submitted the last of the challenged alternative plans to Congress providing for an overall 3.5% increase in salaries under the statutory pay systems effective on the first day of the first applicable pay period that begins after January 1, 1985, in lieu of an average comparability increase of 18.28% recommended by his Pay Agent. (App., *infra*, 5a). The plan became effective under Executive Order No. 12496, December 28, 1984, 50 F.R. 211, on the first day of the first applicable pay period commencing on or after January 1, 1985, and continued in effect until September 30, 1985. The "comparability gap" of 18.28% indicated in the Pay Agent's recommendation is a cumulative figure reflecting the recurring failure to implement full pay comparability adjustments over a number of years.

[4] Because the President's alternative plan for fiscal year 1984 was superseded by legislation enacting the same increase, the Unions subsequently withdrew their actions concerning fiscal year 1984 and substituted therefor challenges to the August 30, 1984 alternative plan for fiscal year 1985 described *supra*, n.3.

plan provision. The court principally reasoned that the legislative history did not establish that Congress would not have enacted the alternative pay plan procedure without the one-House veto. In addition, the district court rejected the Unions' argument that, without the one-House veto, the alternative pay plan was an unconstitutional delegation of legislative authority (App., *infra*, 10a-12a).[5] Accordingly, the district court granted the government's motion for summary judgment on July 31, 1985.

On December 2, 1986, the court of appeals affirmed. The court first rejected the Unions' argument that, without the one-House veto, the alternative pay plan procedure was an improper delegation of legislative power to the President. The court concluded that the Act provided sufficient standards to confine the President's discretion in prescribing an alternative pay plan. (App., *infra*, 23a). In addition, the court held that the one-House veto provisions should be severed from the alternative pay plan. Acknowledging that the "dominant legislative policy behind the Pay Act was to maintain comparability between federal pay rates and those in private enterprise," the court nonetheless declined to find the alternative pay plan inseverable from the one-House veto (App., *infra*, 24a, 27a).

REASONS FOR GRANTING THE PETITION

The Federal Pay Comparability Act is a carefully designed congressional effort to provide a comprehensive mechanism for annually adjusting statutory pay to levels comparable to private sector rates of pay. The court of

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[5] The district court also rejected AFGE's argument that the fiscal year 1985 alternative plan, if constitutional, is still contrary to the Pay Act insofar as the pay adjustments effectuated by the plan did not become effective until January, 1985, whereas the Act requires the plan to be effective in October. 5 U.S.C. Section 5305(c)(2) (App., *infra*, 13a).

appeals' decision to sever the Act's one-House veto from its alternative pay provision creates a statute which is unconstitutional and at odds with this Court's precedent. The court's decision completely subverts the Congress' original intent by giving the President unilateral and unchecked power to set federal pay completely outside the framework Congress had so carefully established.

This case presents two central issues of far-reaching importance that arise in the wake of *Immigration and Naturalization Service* v. *Chadha, supra.* First, it poses the fundamental question of whether the court of appeals' decision to sever the Pay Act's legislative veto from the statute's alternative pay provision results in an unconstitutional delegation of legislative authority to the President. Though this Court has not recently struck down a statute on grounds of improper delegation, the *Chadha* decision requires that close scrutiny be given to broad delegations of legislative authority made in statutes now shorn of the legislative veto. Indeed, delegations of a virtually standardless nature are not atypical of statutes, such as the Pay Act, that contain a legislative veto.[6] Those delegations raised no constitutional problem—and were of little concern to Congress—before *Chadha*, precisely because Congress retained the critical control device of the veto. Eliminating the veto has created, at least in this case, an unconstitutional imbalance of power between Congress and the President: severance of the Pay Act's one-House veto leaves standing an unchecked shift of legislative power to the President.

Contrary to the court of appeals' decision, the delegated authority contained in the Pay Act's alternative pay provision cannot pass constitutional muster. That provision now gives the President unlimited authority to

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[6] *See INS* v. *Chadha, supra,* 103 S.Ct. at 2795 (White, J., dissenting) (stressing that the legislative veto was a "central means" by which Congress secured the accountability of the President and the independent agencies.).

set federal pay at any level he chooses. The Act is devoid of any meaningful standards that guide the President in the exercise of his discretion and hence the alternative pay provision, as re-constituted by the court of appeals, represents an overbroad delegation of legislative power.

This case raises a second important post-*Chadha* issue: namely, what is the correct severability analysis to be applied to statutes containing legislative vetoes.[7] Here, the question is whether the court of appeals erred in holding that the Pay Act's legislative veto is severable from the Act's alternative pay provision—to which it is expressly attached—on the ground that Congress would have been unwilling to provide federal employees pay comparability with their private sector counterparts "without *some* mechanism for limiting pay adjustments during periods of economic hardship." (App., *infra*, 25a; emphasis added).

The analysis of the court below is at odds with *Chadha* and other Supreme Court precedent. Those decisions teach that the pertinent question in determining whether the congressional veto should be severed from the alternative pay provision is not whether Congress would have preferred "some" alternative procedure to comparability pay adjustments, but whether Congress would have enacted the alternative pay section, found in the Act, in the absence of the veto.

In conducting its severability inquiry, the court of appeals compounded its error by deviating from this Court's precedent in a second way. The court's decision to sever the alternative pay provision from the one-House veto relied, to a large degree, on post-*Chadha* congressional actions concerning federal pay. But as this Court's decisions clearly instruct, the only relevant inquiry is

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[7] *See Alaska Airlines, Inc.* v. *Donovan*, 766 F.2d 1550 (D.C. Cir. 1985), *cert. granted*, 106 S.Ct. 1259 (1986).

what the 1970 Congress that passed the Pay Act would have done in the absence of the one-House veto—not what subsequent Congresses have done. As we demonstrate below, if the court of appeals had conducted the proper severability analysis, it would have determined that Congress would never have adopted the Act's alternative pay provision without the check of the one-House veto.

In addressing the two central post-*Chadha* issues just described, this Court would also resolve a question of great practical significance to the operation of the federal government. At stake is the statutory mechanism by which adjustments are effectuated to the pay of millions of federal employees including: (1) individuals whose pay is set forth in the General Schedule (5 U.S.C. Section 5332(a)), the Foreign Service Schedule (22 U.S.C. Section 3963), and the schedules for the Department of Medicine and Surgery, Veterans' Administration (38 U.S.C. Section 4107);[8] positions of the Executive Schedule;[9] the Vice-President;[10] members of Congress;[11] members of the federal judiciary, including this Court;[12] and members of the uniformed services.[13] The constitutionality of the Act's alternative pay provision thus presents a question that affects the structure and operation of all three branches of our government.

Additional, pragmatic considerations also counsel review. Without further instruction from this Court, the lower courts will continue to struggle with both the severability issue and the delegation questions that are certain to arise as a result of *Chadha*. *See., e.g., EEOC*

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[8] *See* Sections 5301(b) and (c) and 5305(a)(2); App., *infra*, 31a.

[9] *See* Section 5318.

[10] *See* 3 U.S.C. Section 104.

[11] *See* 2 U.S.C. Section 31(2).

[12] *See* 28 U.S.C. Section 461(a).

[13] *See* 37 U.S.C. Section 1009(b).

v. *Pan American World Airways*, 576 F.Supp. 1530, 1535 (S.D. N.Y. 1984) ("there is no clear signal from the Supreme Court to assist the inferior courts in dealing with a host of foreseeable post-*Chadha* problems."). *See also, EEOC* v. *Allstate Insurance Co.*, 104 S.Ct. 3499 (1984) (Burger, C.J., and O'Connor, J., dissenting from dismissal of appeal for want of jurisdiction) (acknowledging that "lingering questions" remain in the wake of *Chadha*); *Process Gas Consumers Group* v. *Consumer Energy Council of America*, 463 U.S. 1216, 1218 n.* (1983) (White, J. dissenting) (case presents the "important question of whether the legislative veto is severable").

In sum, review of the court of appeals' erroneous resolution of these important issues is warranted by this Court.

I. ABSENT THE CHECK OF THE PAY ACT'S LEGISLATIVE VETO, THE PRESIDENT'S ALTERNATIVE PAY PLAN AUTHORITY IS AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE AUTHORITY.

Under the court of appeals' decision, the Pay Comparability Act has been transformed into a statute that gives the President uncircumscribed authority to set federal pay at whatever level he chooses, without any guidance or any standards by which to measure his discretion. Because exercise of the President's authority had been expressly conditioned on the Act's legislative veto, it is not surprising that Congress should have described the President's authority in such general terms. But with *Chadha*'s elimination of the legislative veto, Congress' lack of guidance is now fatal and has resulted in an unconstitutional delegation of legislative authority.

This Court long ago recognized that Article I of the Constitution imposes a limit on Congress' ability to delegate its law-making power to the other branches of government: "That Congress cannot delegate legislative power

to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution." *Field* v. *Clark*, 143 U.S. 649, 692 (1892).

In 1935, this Court invoked the delegation doctrine to strike down portions of the National Industrial Recovery Act of 1933. *See A.L.A. Schecter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935); *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935). In those cases, the Court held that Congress had failed to set standards that would sufficiently confine the discretion of individuals exercising delegated authority. *See Schecter*, 295 U.S. at 541-42; *Panama Refining*, 293 U.S. at 430.

It is clear that while no statute has lately been voided because of delegation defects, the principles of the doctrine continue to be vital. *See e.g., National Cable Television Association* v. *United States*, 415 U.S. 336 (1974) and *Kent* v. *Dulles*, 357 U.S. 116 (1958) (where the Court invoked the delegation doctrine to read a statute narrowly and thus avoid the constitutional question). *See also Industrial Union Dept.* v. *American Petroleum Institute*, 448 U.S. 607 (1980) (Rehnquist, J. concurring) (concluding that section of Occupational Safety and Health Act of 1970 improperly delegated authority to the Secretary of Labor). Indeed, statutes possessing the voided legislative veto are now obvious candidates for scrutiny of delegation flaws. Believing it had the control device of the veto, Congress was clearly encouraged to make the most sweeping and undefined delegations to the executive. Without the veto, many of those statutes, such as the Pay Act, are now lacking the only means Congress retained to control the discretion it had bestowed.

As this Court instructed in *Yakus* v. *United States*, 321 U.S. 414, 425 (1944), the essential delegation inquiry is whether Congress' guidance "sufficiently marks the field within which the Administrator is to act so that

it may be known whether he has kept within it in compliance with the legislative will." Under this test, the alternative pay provision of the Act cannot survive constitutional scrutiny.

Section 5305(c)(1) of the Pay Act provides that the President may invoke the alternative plan authority if "because of national emergency or economic conditions affecting the general welfare" he considers it "inappropriate to make the pay adjustment required" by the statute. In the event the President decides to invoke his authority, he transmits an alternative pay plan containing a "pay adjustment as he considers appropriate . . ." *Id.* (App., *infra*, 33a). That adjustment automatically takes effect unless vetoed by either House. Without the check of the legislative veto, this delegation is now constitutionally flawed for two basic reasons.

First, it does not even attempt to define the events that may trigger the President's use of the alternative plan. The alternative pay provision offers no guidance as to what "economic conditions affecting the general welfare" are sufficient for the President to invoke his authority. It does not even generally suggest, for example, whether there must be a depression, or whether a recession, inflation, or stagflation is sufficient to invoke the alternative provision. Similarly, section 5305(c)(1) provides no guidance as to what constitutes a "national emergency." In short, both triggering events are completely open-ended terms that give the President virtually free reign to invoke his power.

The second delegation flaw is even more egregious. Once he invokes his power, the President forwards a pay adjustment "he considers appropriate . . ." 5 U.S.C. 5305(c)(1). (App., *infra*, 33a). Simply stated, the effect of this language is to let the President set federal pay at whatever level he wishes. The statute gives the President no guidance whatever as to the appropriate size of

pay adjustments. It does not suggest, for instance, whether budget deficits, recessions, or inflation may require different adjustment. Nor does it even generally prescribe when the President should freeze federal pay, order a cost-of-living adjustment, or implement an adjustment that is a compromise between the two figures. Nor can it be said that the Pay Act's policies guide the President, because the alternative plan allows the President to set pay in a manner totally at odds with the Act's central objective of achieving comparability.

Clearly, the court of appeals' decision simply never came to grips with the alternative pay plan's serious delegation defects. First, the court concluded that the alternative pay provision contained sufficient standards to circumscribe the President's discretion. The court observed that: "The alternative pay plan provision specifies why the plan is to be prepared [because of a "national emergency" or economic conditions affecting the general welfare], when the plan must be submitted [by September 1 of the applicable year], and what it must contain [a pay adjustment the President deems "appropriate"]." Obviously, this "specificity" in no way addresses the two critical delegation flaws we have identified.

The court of appeals also pointed to *Yakus* v. *United States* and *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943), as supporting its conclusion that the alternative pay provision contained sufficient standards to guide the President. That reliance is misplaced. *Yakus* concerned the Emergency Price Control Act of 1942, which delegated authority to an administrator during wartime to stabilize commodity prices. In upholding the delegation, this Court noted that the statute was a temporary war-time measure and explained that the administrator did not have unbridled discretion to determine prices. Price determinations had to be keyed to a base period that began before start of the war. 321 U.S. at 427. Moreover, the prices set had to be "fair and

equitable" with "due consideration" given to specified factors. *Id.*, at 421, 423. As *Yakus* makes clear, Congress guided the administrator as to when the price-fixing power should be used; it also prescribed standards for determining "the particular prices to be established." *Id.*, at 423.

In marked contrast, the Pay Act's alternative plan provision furnishes no standards to guide the President. Unlike *Yakus*, the President is given no guidance as to the "particular" pay levels he is to establish. To the contrary, he may order whatever pay levels he wishes. Finally, it must be appreciated that in *Yakus* the delegated power at issue was designed to "effectuate the declared policy of the Act to stabilize commodity prices. . . ." *Id.* The uncircumscribed power of the Pay Act's alternative pay provision is something quite different: it now actually defeats the Act's overriding objective—pay comparability.

Nor does *National Broadcasting Co.* support the court of appeals. There, the Court examined the constitutionality of authority delegated to the Federal Communications Commission by the Communications Act of 1934. The Court concluded that the statute's standard of "public interest, convenience, or necessity" was sufficient to circumscribe the Commission's authority. *National Broadcasting Co.*, 319 U.S. at 215-16. To be sure, the standard in *National Broadcasting Co.* was a broad one, but, contrary to the court of appeals' apparent belief, it was more limiting than what is found in the Pay Act's alternative plan provision. The "public interest" standard at least informed the FCC that it would be accountable for its actions and that it would be measured by some yardstick. The Pay Act's alternative pay provision, by contrast, gives the President *carte blanche* to make any pay adjustment "he considers appropriate," and furnishes no standard at all to measure his actions.

In conclusion, it must be stressed that the delegation of authority which the court of appeals would permit is even broader than the delegation invalidated in *A.L.A. Schecter Poultry*, which at least contained some broad policy guidance, 295 U.S. at 521, n.3. In *Schecter*, the Court warned that "Congress can not delegate legislative power to the President to exercise unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry." *Id.* at 537-538. Here, the court of appeals' reading of the Pay Comparability Act would confer unfettered discretion on the President to reject the Act's comparability policy and to set federal pay policy however he thinks is advisable because of his own opinions about national economic conditions. Such an open-ended delegation is impermissible under any formulation of the rules governing delegation of legislative authority.

II. THE SEVERABILITY ANALYSIS EMPLOYED BY THE COURT OF APPEALS IS CONTRARY TO SUPREME COURT PRECEDENT.

A. The Court Below Did Not Examine Whether the Congress That Enacted the Pay Comparability Act Would Have Adopted the Act's Alternative Pay Plan in the Absence of the Legislative Veto.

The problem of whether the Act's alternative pay plan provision is an unconstitutional delegation of legislative authority could, of course, be avoided if the legislative veto were held inseverable from the alternate plan procedure. The court below failed to do that, but in reaching its conclusion, the court's severability analysis strayed from this Court's precedent in two fundamental ways.

First, the court of appeals never actually conducted the proper inquiry: namely, whether the Congress which enacted the Pay Act in 1970 would have adopted the Act's alternative pay plan without retaining a veto to

control the President's exercise of that authority.[14] That this was the salient question for the court of appeals to have addressed is made clear by this Court's precedent. This Court has consistently instructed that if one element of a statutory provision is held unconstitutional the entire provision must fail if " 'it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.' " *Chadha*, 462 U.S. at 931-932, quoting *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 234 (1932). *See also Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976).[15]

Instead of examining the pivotal issue of whether Congress would have delegated to the President the Act's alternative plan authority without reserving for itself the one-House veto power, the court of appeals' confused analysis turned on its belief that Congress would not have been willing to provide federal employees with pay comparability "without some mechanism for limiting pay adjustments during periods of economic hardship." (App., *infra*, 25a). The court of appeals stated that "Congress did not intend to implement comparability pay increases at any cost." (*Id.*, 25a).

Whether Congress would have provided federal employees with pay comparability in the absence of an alternative pay provision is not irrelevant to the ultimate resolution of this case. That question is obviously pertinent to determining what, if anything, of the Pay Act should survive in the absence of the legislative veto and the alternative pay plan provision. But asking whether Congress would have provided comparability without

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[14] The court of appeals' decision purports to address this question (App., *infra*, 23a), but examination of the court's opinion shows that it devoted no analysis to answering it.

[15] The relevant issue of legislative intent is whether "the legislature would have been satisfied *with what remained.*" *Champlin Refining*, 286 U.S. at 235 (emphasis added).

"some" alternative pay provision obviously does not speak to—and certainly does not answer—the crucial threshold question: whether Congress would have adopted the Act's alternative pay provision without the check of the veto. As we shall show, if the court of appeals had concentrated on the critical legislative history concerning this salient question, it would have discovered that Congress would never have included the alternative procedure without retaining the last word on its exercise. Moreover, the court of appeals would have discerned that Congress' overriding concern was to effect a comprehensive mechanism to ensure pay comparability and hence would have wanted that mechanism, which is fully operable as a law, to remain in place even without the legislative veto and alternative plan provision.

The court of appeals deviated from this Court's precedent in a second way: in determining whether the Act's one-House veto is severable from the alternative pay plan provision, it improperly relied, to a large degree, on post-*Chadha* congressional actions concerning federal pay. The court asserted that in the years since *Chadha* Congress has had opportunities to eliminate the alternative pay provision from the Pay Act but has not done so. The court concluded that if, as NTEU contended, "the legislative will was as strongly opposed to granting the President authority to submit an alternative pay plan without the check of a one-House veto, it would be expected that in the years following *Chadha*, Congress would have amended the Pay Act to eliminate the alternative pay plan provision." (App., *infra*, 27a). Similarly, the court of appeals found influential the fact that since *Chadha*, Congress has, in some years, not challenged the President's alternative pay recommendations.[16]

[16] The court of appeals stated that since *Chadha* Congress has only once, in 1984, legislated a pay adjustment different from that proposed in the President's alternative pay plan. Congress has, however, also legislated, for fiscal year 1987, a greater pay adjust-

It is manifest that the court of appeals' heavy reliance on post-*Chadha* congressional actions was fundamental error. As the decisions of this Court make clear, the only relevant inquiry is what the 1970 Congress would have done in the absence of a veto—not what subsequent Congresses have done. *Chadha*, *supra*, 462 U.S. at 931-932; *Champlin*, *supra*, 286 U.S. at 565.

In sum, the court of appeals' severability analysis was fundamentally flawed. It never conducted a careful analysis of whether Congress would have adopted the alternative pay plan provision without the important check of the one-House veto; the court instead asked whether Congress would have wanted a pay comparability mechanism without "some" alternative pay provision. Moreover, the court compounded this error by resting its conclusion to sever the veto from the alternative pay provision not on the intent of the 1970 Congress, which passed the Pay Act, but on the congressional actions since *Chadha*.

B. If the Court of Appeals Had Conducted the Proper Inquiry, It Would Not Have Severed the Legislative Veto from the Alternative Pay Plan Provision.

If the court of appeals had addressed the critical question of this case—whether the Congress that passed the Pay Act would have delegated to the President the authority to propose an alternative pay plan without the legislative veto—it would have concluded that the veto was inextricably bound to the alternative pay provision and thus could not be severed. Had it conducted the proper examination, the court would have determined that when a legislative veto provision, such as that found in the Pay Act, is so "mutually connected with and dependent on [other provisions of the section] . . . to warrant a belief that the legislature intended them as a

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ment than that proposed by the President. *See* Continuing Appropriations, Fiscal Year 1987, Pub. L. No. 99-591 (1986).

whole, . . . all the provisions which are thus dependent, conditional or connected, must fall with them." *Warren* v. *Charlestown*, 2 Gray 84, 99 (Mass. 1854).[17]

The error of the court of appeals' conclusion is first made clear by the plain language and structure of 5 U.S.C. 5305(c), the statutory provision containing both the veto and the alternative pay provision. In writing the Pay Comparability Act, Congress made clear its central objective. As the very name of the Act demonstrates, Congress wished to establish a mechanism that would annually adjust federal pay so that it would be "comparable with private enterprise pay rates for the same levels of work." 5 U.S.C. 5301(a). To that end, the President, his Pay Agent and the Advisory Committee on Federal Pay follow precise congressional instructions for determining comparability figures on the basis of data from the Bureau of Labor Statistics. The President must review the reports and recommendations of the Pay Agent and the Advisory Committee and then adjust federal salaries in accordance with comparability principles. In short, the Act provides a highly detailed mechanism delegating to the President the authority to determine and implement pay comparability. Significantly, Congress

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[17] Even though the Pay Comparability Act contains no severability clause, the court of appeals employed a strong presumption in favor of severability to further shortcut its analysis. Citing *Chadha, Regan* v. *Time, Inc.*, 468 U.S. 641, 652-53 (1984) and *Alaska Airlines, Inc.* v. *Donovan*, 766 F.2d 1550, 1559-61 (D.C. Cir. 1985), *cert. granted*, 106 S.Ct. 1259 (1986), the court asserted that a statute is presumed severable if what remains is fully "operable as a law" (App. *infra*, 23a). This Court's decision to grant review in *Alaska Airlines* prompts us to note that we believe that the court's presumption of severability in the instant case was unwarranted. It is important to appreciate that, unlike the Pay Act, the statute at issue in *Chadha* contained a severability clause. In addition, the "presumption" in *Regan* was not endorsed by the majority of the Court. Indeed, the presumption seems peculiarly inappropriate in the legislative veto situation, where, by definition, Congress has expressed the desire not to completely delegate a power to the President.

attached no legislative veto provision to the finely-tuned comparability mechanism.

Instead, Congress chose to retain veto authority only with respect to an exception to the Act's comparability mechanism—the alternative pay plan provision. The inextricable connection of the veto and the alternative plan authority is made evident by the design of 5 U.S.C. 5305(c). As noted, it houses both the veto and alternative plan authority. Congress took care to ensure that it could have the last word on any recommended alternative to pay comparability. Section 5305(c) stipulates that any alternative plan be submitted with the reasons for the recommendation and that it be submitted at least thirty days before it would become effective. During that time, either House could extinguish what Congress clearly considered to be only a Presidential proposal. Section 5305(c) thus makes plain on its face that Congress did not want simply to authorize the President to implement an alternative pay plan—in marked contrast to Congress' complete delegation to the President of the power to implement pay comparability. Instead, Congress expressly *conditioned* the President's alternative pay authority on its decision not to exercise the legislative veto. In sum, the plain language and structure of the Act makes clear that the veto is but a part of an integrated and conditional delegation of legislative authority. The legislative veto is inseverable from the alternative pay provision.

The inseverability of the veto and the alternative pay plan is made even more evident by the Act's legislative history, which was virtually ignored by the court of appeals. That history consistently underscores that the establishment of a procedure for automatic, annual comparability adjustments was the foremost and overriding purpose of the Act. Because the Act was substantially overhauled in conference,[18] it is important to examine

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[18] 116 Cong. Rec. 44283 (1970) (remarks of Rep. Udall); *Id.* at 44105 (remarks of Sen. McGee).

the statements of the conferees. Every conferee who spoke in debate on the conference bill affirmed that the legislation was designed to guarantee automatic comparability between federal and private sector rates of pay. Thus, Senator McGee stated, "the point of the legislation is to approve a mechanism for achieving comparability for Federal employees. This is a principle legislated by this body a good many years ago. Now we are simply trying to translate that principle into a fact of life." 116 Cong. Rec. 44096.[19]

The Act itself was consistently described by members of both Houses as merely a mechanism for implementing established policy. Thus, Representative Udall, one of the authors of the conference committee bill, stated: "In this bill we say federal pay should be comparable to pay in private enterprise. We delegate to the Bureau of Labor Statistics and to the Bureau of the Budget and to the President of the United States the power to determine what numbers are necessary, what dollar figures are necessary to carry out that policy . . . we make the policy and we delegate to someone else the mechanics of carrying out that policy." *Id.* at 44284. Representative Hogan stated that "[w]hat we are doing is creating an administrative mechanism which would enable the pay

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[19] *See also* remarks of Representative Hogan, "the Congress of the United States promised Federal employees comparability in 1962, but it has been an empty promise since that time because we have been unable to respond to the cost of living increases in sufficient time to get the benefit to the employees when they deserve them." Through the 1970 Act, Congress was finally "fulfill[ing] a pledge which the Congress made in 1962 to afford full comparability to federal employees." *Id.* at 44287. Similarly, Representative Dulski, Chairman of the House Post Office and Civil Service Committee stated that "[t]he primary purpose of the legislation now before the House is to prescribe the statutory procedures for fixing rates of pay under the comparability system for employees under the three statutory salary systems . . ." *Id.* at 44290.

raise to reach the employees sooner to give some equity in the matter of comparability." *Id.* at 44287.[20]

In brief, the legislative history of the statute is replete with statements by its principal proponents, and devoid of any dissenting voice, that the Act was intended to effectuate a long-standing policy of pay comparability by establishing an automatic, scientific mechanism for annually adjusting federal pay rates to levels comparable to private sector rates of pay.

In contrast to the full discussion on the floors of both Houses given the comparability objective, the alternative pay plan provision received almost no congressional attention. When it was mentioned at all, the alternative pay plan was referred to as authority to be used in times of emergency, and it was *always* concurrently observed that Congress retained the authority to override the alternative plan by the one-House veto. Thus, the Conference Report itself directly linked the one-House veto to the alternative pay plan provision. 116 Cong. Rec. 40685. Representative Udall, in responding to arguments that Congress had given away too much authority in this statute, stated, "[i]f however the President decides to say 'Sorry, I am not going to have a pay raise this year,' or if for any other reason he makes any decision other than to achieve the comparability policy, then it will come back to us, and the bill guarantees that we will have a vote on it." *Id.* at 44284. Representative Udall further stated that "[*p*]*art and parcel* to the alternate plan procedure is the congressional review procedure." *Id.* at 44285 (emphasis added).[21]

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[20] And Senator Fong stated: "The new procedures required by [the Act] would drastically reduce the long time lags that are built into the present federal salary comparability system." *Id.* at 44097.

[21] *See also* remarks of Representative Hogan, *Id.* at 44288 and remarks of Representative Dulski, *Id.* at 44290, always linking the alternative pay plan provision with the legislative veto.

The Senate conferees similarly made it clear that the bill "retains for Congress the ultimate decision for putting increases into effect should the President decide against comparability pay adjustments" (remarks of Sen. Fong, *Id.* at 44097). Thus, Senator McGee explained that "[i]f the President decides that [a comparability adjustment] is too much because of the times or because of some national emergency that it should not be allowed at all, and he so decides, in that case it has to be bucked back to Congress for both Houses for judgment and either House can decide to take it." *Id.* at 44099. Thus, it was expected that the alternative pay plan device would be employed only in the specified circumstances of national emergency "including an inflationary crisis" (*Id.* at 44013, remarks of Sen. McGee), and the President's authority was always seen as subject to final action by either House.[22]

Despite this clear evidence that Congress' overriding purpose was to establish a mechanism for implementing the comparability policy, and that the alternative pay plan authority was a narrow exception to that policy, to be used only in the specified circumstances and then only subject to review by each House, the court of appeals severed only the one-House veto provision from the statute but left standing the President's unchecked

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[22] Indeed some of the bill's most severe critics in both parties asserted that even the President's circumscribed role gave him too much authority and represented an abdication of Congressional authority. Remarks of Sen. Stennis, *Id.* at 44102; Remarks of Sen. Ellender, *Id.* at 44107; Remarks of Sen. Packwood, *Id.* at 44099; Remarks of Sen. Church, *Id.* at 44103; Remarks of Rep. Dennis, *Id.* at 44291; Remarks of Rep. Derwinski, *Id.* at 44291. There was only one expression, referred to by the court of appeals, that the Act should grant the President's recommendation "higher standing" than was ultimately given. 116 Cong. Rec. 44102 (Statement of Sen. Holland). Sen. McGee, the bill's sponsor, replied that Congress could always effect the President's proposal by not repudiating it (*Id.*). Moreover, Sen. Holland vigorously opposed the bill, and his opinion is thus no measure of congressional intent.

alternative plan authority. But, in doing so the court of appeals ignored the pertinent history, dismissing it as subject to "varying interpretations." (App., *infra*, 27a). As noted, it erroneously based its reading of Congress' intent largely on post-*Chadha* congressional actions.

The court of appeals also erred in rejecting the Unions' argument that leaving the alternative pay provision intact without the legislative veto would subvert the Act's central purpose by giving the President unchecked power to set federal pay. The court reasoned that severing the alternative pay plan from the legislative veto would not thwart the Act's comparability objective because Congress could always override the President's alternative with new legislation. The court's contention is clearly unpersuasive.[23] It would require Congress to legislate again the comparability principle even though it had already done so in 1970.[24] Obviously, if Congress believed that the option of new legislation was an adequate means of safeguarding the Act's objectives, it would not have attached the one-House veto at all to the alternative pay provision.

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[23] The court of appeals suggested that the "legislative option was clearly understood" by the two key Senate and House sponsors (App. *infra*, 26a). A reading of the cited history shows, however, that when Rep. Udall and Sen. McGee acknowledged Congress' option to legislate they were addressing the possible need on occasion to override *comparability*. The specific concern was that if the House vetoed the President's alternative recommendation it would mean that the full comparability adjustment would automatically become effective. It was in this context that the legislators noted that Congress could always pass a new law to avoid that result. Clearly, they never contemplated that it would be necessary to keep passing new legislation to achieve comparability. That, of course, was the very thing Congress wished to avoid.

[24] Of course if the 1970 legislation is no longer desirable then it is up to Congress—and not the courts—to change it. It would be clear error to ask whether the current Congress would wish to retain the alternative pay plan without the veto.

In addition, we take issue with the court of appeals' belief that Congress' "legislative option" is not inhibited by the President's veto power.[25] Clearly it is. Legislation is, of course, a joint act of Congress and the President. Congress cannot act without the President's cooperation or a two-thirds vote in each House. A Congress that wished to implement the original comparability goal, and reject the President's alternative could only do so by super-majority.

The court of appeals stressed that Congress saw the alternative pay provision as providing flexibility in what was otherwise an automatic comparability process. That Congress wanted to provide the possibility of an alternative to pay comparability is, of course, self-evident; but its mere existence does nothing to illuminate whether the veto and alternative pay provision should be observed. Indeed, the very colloquies the court cited in making its observation reveal that discussions of the alternative plan always linked its exercise to the veto. *See* 116 Cong. Rec. 44099-102 (statements of Sen. McGee); *id.* at 44285 (statements of Rep. Udall).[26]

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[25] Clearly, the court's subjective view of "the political reality" is speculative at best; any new legislation to achieve pay comparability would be of undeniable importance and it was obviously improper for the court to assume that such legislation would be immune to a presidential veto even if it was one element of a larger bill.

More important, the court's assertion misses a critical point: the fundamental shift in power, from the Congress to the President, that has occurred as a result of *Chadha*. The Pay Act, as it stands after the decision of the court below, gives the President the power to defeat unilaterally the Act's clear policy of ensuring comparability. Now, to overcome the President's alternative plan and accomplish comparability with a new law, Congress could not effectuate the Act's original objective without sufficient votes to override a presidential veto. As noted, to reaffirm the Pay Act it would require a super-majority.

[26] Closely analogous to the instant case is *McCorkle* v. *United States*, 559 F.2d 1258 (4th Cir. 1977). The court's severability

In concluding that the alternative pay provision should be left intact, the court of appeals observed that, without

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analysis there is highly instructive here. In that case, a federal employee challenged provisions of the Federal Salary Act of 1967, which contained a legislative veto similar to that at issue here. Claiming that a one-House veto attached to a provision governing Executive Schedule salaries was unconstitutional, the employee asserted that he was entitled to a pay raise recommended by the President but vetoed by the Senate.

Although the court did not reach the question of the constitutionality of the one-House veto, it held that the President's authority to set Executive pay was not severable from the one-House veto provision, so the employee could not recover damages, even if the one-House veto was found unconstitutional. In holding that the two provisions could not be severed, the court examined the purpose of the statute and its legislative history and determined that Congress would not have granted the President authority to establish rates of pay, absent the one-House veto provision. *Id.* at 1262. The court also observed that "[w]hen the questioned clause restricts a power granted by the legislature, the case against severance is strong. Otherwise, the scope of the power would be enlarged beyond the legislature's intent." *Id.* at 1261.

As in the Federal Salary Act of 1967, here too Congress viewed its retention of the veto power as a necessary restriction on the power granted to the President. The presidential power in question there was the same as that in question here—the power to determine rates of pay for federal employees (albeit a different group of employees). It is equally inconceivable here that Congress would have yielded completely that power to the President. Therefore, for the same reasons as in *McCorkle*, the alternative pay provision and the one-House veto should be held to be inseverable. *See also American Federation of Government Employees* v. *Pierce*, 697 F.2d 303 (D.C. Cir. 1982); *City of New Haven, Conn.* v. *United States*, No. 86-5319 (D.C. Cir., Jan. 20, 1987).

The court of appeals declined to follow *McCorkle*; it noted that *McCorkle* dealt with a different salary statute but it did not explain why the highly analogous factual situation was not instructive. The court instead found persuasive a dissenting opinion in *Atkins* v. *United States*, 556 F.2d 1028, 1082-99 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978); that opinion addressed whether the entire Postal Revenue and Federal Salary Act of 1967 should have been struck down in the absence of its legislative veto—a far different issue from that presented in this case.

"such a provision," many in Congress would not have voted for the Pay Act (App., *infra*, 25a). Again, that assertion, even if it were a justifiable reading of the intent of some lawmakers, sidesteps the central question of whether Congress would have adopted the alternative pay provision, found in the Act, without the one-House veto. In any event, the legislative history demonstrates that those who were concerned about an "active pay-setting role for the President" (App., *infra*, 25a) had those concerns accommodated by the provisions in the final bill which gave the President a role in selecting a Pay Agent and the Advisory Committee on Pay and which included him in the process of preparing a pay comparability report and implementing the pay adjustment. *See e.g.*, 116 Cong. Rec. 40684; 44283-85. Both the conference report and Rep. Udall explained that the greatest difference between the House bill—which had no role at all for the President—and the final conference substitute was the role the final version gave the President in determining the comparability adjustment. Significantly, the court of appeals could identify no member of Congress who pointed to the alternative pay provision as pivotal to his support for the bill. The fact is that no Senator or Representative ever stated that the alternative pay procedure was a key element of the final bill.

In sum, the court's resolution of the severability problem posed in this case actually turns the Pay Act on its head. It gives the President complete authority to establish any level of pay he deems desirable under his view of economic realities. He may do so, and indeed has done so, in complete contravention of the comparability principle established as the law of the land. Aside from the question of whether he may constitutionally exercise such power, it is eminently clear that the Congress that passed this law would not have given him such unguided, unchecked authority to flout the policies it had so painstakingly developed.

CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue, and the judgment and opinion of the United States Court of Appeals for the Federal Circuit should be reviewed by this Court.

Respectfully submitted,

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APPENDICES

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. Nos. 84-2654, 83-1914

NATIONAL TREASURY EMPLOYEES UNION, *et al.*,
Plaintiffs,

v.

RONALD REAGAN and UNITED STATES OF AMERICA,
Defendants.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, *et al.*,
Plaintiffs,

v.

RONALD REAGAN and UNITED STATES OF AMERICA,
Defendants.

July 31, 1985

Lois G. Williams, Director of Litigation and Richard Edelman, Asst. Counsel, Nat. Treasury Employees Union, Washington, D.C., for plaintiff Nat. Treasury Employees Union.

Charles A. Hobbie, Washington, D.C., for plaintiff American Federation of Government Employees, AFL-CIO.

Neil H. Koslowe, U.S. Dept. of Justice, Washington, D.C., for defendants.

MEMORANDUM

GASCH, Senior District Judge.

These are actions challenging the constitutionality of the Federal Pay Comparability Act, 5 U.S.C. § 5301 *et seq.*, based on the Act's one-House legislative veto provision, and the authority of the President to implement an "alternative pay plan" under the Act.[1] Presently before the Court is defendants' motion for judgment on the pleadings in *National Treasury Employees Union v. Reagan* and cross-motions for summary judgment in both cases. For the reasons set forth below, the Court denies defendants' motion for judgment on the pleadings and grants defendants' motions for summary judgment.

BACKGROUND

Plaintiff American Federation of Government Employees AFL-CIO ("AFGE") is an unincorporated association having its principal place of business in Washington, D.C. It is the exclusive bargaining representative for about 690,000 federal employees. The other named plaintiffs in *AFGE v. Reagan*[2] are members of AFGE who work and reside in the District of Columbia and who are federal employees paid under the General Schedule whose rates of pay were adjusted under the alternative pay plans submitted by the President for fiscal years 1980, 1981, 1983 and 1985 under the Federal Pay Comparability Act ("Pay Act").

Plaintiff National Treasury Employees Union ("NTEU") is an unincorporated association having its principal place of business in Washington, D.C. It is the exclusive bargaining representative for approxi-

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[1] These cases, which have not been consolidated, raise virtually identical issues, and for convenience, the Court addresses in one opinion the issues pending before the Court.

[2] Thomas C. Lipscomb, Anita Longstreet, and Cecilia Westray.

mately 110,000 federal employees. Named plaintiff Haamid Nriddin is a member of NTEU who works and resides in the District of Columbia and who, like the AFGE individual plaintiffs, is a federal employee whose pay was adjusted under the 1985 fiscal year alternative pay plan.[3]

The Pay Act provides the statutory mechanism for annual adjustment in the rates of pay of federal employees subject to statutory pay systems. It implements the Congressional policy that federal pay for employees under statutory pay systems (1) provide equal pay for substantially equal work; (2) maintain pay distinctions in keeping with work and performance distinctions; (3) make federal pay rates comparable with private sector pay rates for the same levels of work; and (4) ensure that pay levels for the statutory pay systems are interrelated. *See* 5 U.S.C. § 5301(a).

The Pay Act directs the President to select a Pay Agent to prepare an annual report comparing rates of pay in private enterprise with rates in the statutory pay systems and recommending appropriate adjustments for federal salaries. 5 U.S.C. § 5305(a)(1). Section 5305(b) establishes procedures to be followed by the Pay Agent in arriving at a recommended increase. After considering the Pay Agent's report and the findings and recommendations of the Advisory Committee on Federal Pay established pursuant to 5 U.S.C. § 5306, the President adjusts the rates of pay of each statutory pay system in accordance with the principles set forth in Section 5301(a). 5 U.S.C. § 5305(a)(2). The pay adjustment becomes effective without any further Congressional action as of the beginning of the first applicable pay period beginning on or after October 1 of the applicable year. *Id.*

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[3] Other individual plaintiffs in *NTEU v. Reagan* reside outside the District of Columbia.

If national emergency or economic conditions affecting the general welfare render a pay adjustment required by Section 5305(a) inappropriate, the President may prepare and transmit to Congress before September 1 of that year an alternative plan for pay adjustments. 5 U.S.C. § 5305(c)(1). The alternative pay plan becomes effective on the first day of the first applicable pay period beginning on or after October 1 of that year unless, within 30 days of transmittal, either House adopts a resolution disapproving the alternative pay plan. 5 U.S.C. § 5305(c)(2). If the alternative pay adjustment plan is disapproved, the President must adjust pay in accordance with the four principles of comparability set forth in 5 U.S.C. § 5305(a)(2), (3). 5 U.S.C. § 5305(c)(2), (m).

AFGE challenges the President's alternative pay adjustment plans for fiscal years 1980, 1981, 1983 and 1985; NTEU challenges only the fiscal year 1985 plan.

On August 31, 1979, President Carter sent to Congress an alternative pay plan proposing an average increase of 7.02% in GS pay rates for fiscal year 1980, in lieu of an average comparability increase of 10.4% recommended by his pay agent. Neither House of Congress disapproved. On October 9, 1979, President Carter issued Executive Order No. 12165, 44 Fed.Reg. 58671 (1979), which increased GS pay rates by an average 7.02% beginning the first day of the first applicable pay period on or after October 1, 1979, and continuing through September 30, 1980. AFGE Motion for Summary Judgment at 6 ("AFGE Motion"); Defendants' Motion for Summary Judgment in *NTEU v. Reagan* at 8 ("Defendants' Motion").

On August 29, 1980, President Carter sent to Congress an alternative pay plan proposing an average increase of 9.1% in GS pay rates for fiscal year 1981, in lieu of an average comparability increase of 13.5% recommended by his pay agent. Neither House of Congress disapproved. On October 16, 1980, President Carter is-

sued Executive Order No. 12248, 45 Fed.Reg. 69199 (1980), which increased GS pay rates by an average 9.1% beginning the first day of the first applicable pay period on or after October 1, 1980, and continuing through September 30, 1981. AFGE Motion at 7; Defendants' Motion at 8.

On August 26, 1982, President Reagan sent to Congress an alternative pay plan proposing an average increase of 4% in GS pay rates for fiscal year 1983, in lieu of an average comparability increase of 18.47% recommended by his pay agent. Neither House of Congress disapproved. On October 8, 1982, President Reagan issued Executive Order No. 12387, 47 Fed.Reg. 44981 (1982), which increased GS pay rates by an average 4% beginning the first day of the first applicable pay period on or after October 1, 1982, and continuing through September 30, 1983. AFGE Motion at 7; Defendants' Motion at 8-9.

On August 30, 1984, President Reagan sent to Congress an alternative pay plan proposing no increase in GS pay rates for the first three months of fiscal year 1985 and an average 3.5% increase beginning the first day of the first applicable pay period on or after January 1, 1985, in lieu of an average comparability increase of 18.28% recommended by his pay agent. Neither House of Congress disapproved. The 3.5% increase became effective on January 1, 1985, continuing through September 30, 1985. AFGE Motion at 7; NTEU Motion for Summary Judgment at 11; Defendants' Motion at 8-9.

DISCUSSION

I.

Defendants contend that this Court does not have jurisdiction over NTEU's and AFGE's actions because under the Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491, they can only be brought in the United States Claims Court. Sec-

tion 1346(a)(2) gives district courts concurrent jurisdiction with the Claims Court over "any . . . civil action or claims against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department," 28 U.S.C. § 1346(a)(2), that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *United States v. Mitchell*, 463 U.S. 206, 217, 103 S.Ct. 2961, 2968, 77 L.Ed.2d 580 (1983). The Claims Court has exclusive jurisdiction of such claims exceeding $10,000. 28 U.S.C. § 1491.

This Court has concurrent jurisdiction with the Claims Court over AFGE's and NTEU's claims. Although AFGE and NTEU seek declaratory and injunctive relief and a writ of mandamus, its actions are really for money damages from the Government—increased federal pay for its members for fiscal years 1980, 1981, 1983 and 1985. District court jurisdiction under the Tucker Act cannot be avoided by framing an essentially monetary claim, such as AFGE's and NTEU's, in terms of injunctive, declaratory or mandatory relief. *Van Drasek v. Lehman*, 762 F.2d 1065, 1071 n.11 (D.C.Cir.1985); *Portsmouth Redevelopment and Housing Authority v. Pierce*, 706 F.2d 471, 474 (4th Cir.), *cert. denied*, 464 U.S. 960, 104 S.Ct. 392, 78 L.Ed.2d 336 (1983); *Jesko v. United States*, 713 F.2d 565, 566 (10th Cir.1983); *Davila v. Weinberger*, 600 F.Supp. 599, 602 (D.D.C.1985).

Defendants assert, however, that the amount of NTEU's and AFGE's claims must be calculated by aggregating the claims of their respective members, thereby exceeding the $10,000 limit and vesting exclusive jurisdiction to hear these actions in the Claims Court.[4] Defendants'

[4] There is no dispute that this court has jurisdiction under the Tucker Act over the claims of those individually named plaintiffs who reside in the District of Columbia, as they each seek less than $10,000 in money damages. *See* n.6 at 765.

argument is without merit. It is well established that aggregation of claims to establish the jurisdictional amount is permissible "when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest." *Zahn v. International Paper Company*, 414 U.S. 291, 294, 94 S.Ct. 505, 508, 38 L.Ed. 2d 511 (1973). If, however, two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, each plaintiff must satisfy the jurisdictional amount requirement. *Id.; Snyder v. Harris*, 394 U.S. 332, 336, 89 S.Ct. 1053, 1056, 22 L.Ed. 2d 319 (1969). Here, the members of NTEU and AFGE who are represented by such organizations have separate and distinct claims.

NTEU v. Nixon, 492 F.2d 587 (D.C.Cir.1974), which also involved a challenge to the Federal Pay Comparability Act, suggests that aggregation of the individual claims of NTEU's and AFGE's members is impermissible in the actions before this Court. In that case, NTEU sued President Nixon to adjust the pay of federal employees as mandated by the Federal Pay Comparability Act. NTEU sought, *inter alia*, monetary damages on behalf of its members. The Court found that it lacked federal question jurisdiction, which then required that the amount in controversy exceed $10,000, because no individual plaintiff had a claim exceeding that amount. The Court stated that aggregation of individual claims was not permitted under *Snyder v. Harris* for purposes of meeting the jurisdictional amount.[5]

Local Division No. 714 v. Greater Portland Transit District, 589 F.2d 1 (1st Cir.1978), on which defendants rely, is distinguishable from the instant cases. In *Greater Portland*, the First Circuit held that the plaintiff union, a representative plaintiff, could aggregate the claims of

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[5] The Court held that subject matter jurisdiction existed based on plaintiff's claim for mandamus relief under 28 U.S.C. § 1361.

its individual members to establish the $10,000 jurisdictional amount, which was then required for federal question jurisdiction. The Court reasoned that the individual union members were not united merely for litigation convenience and economy, but rather were united "by the Union in conformance with the fundamental premise of collective bargaining that a union is to represent its members in all aspects of the labor-management relationship." 589 F.2d at 10. Significantly, the Court stated that the right to interest arbitration, which was at issue, could not be viewed practically as a right possessed by each employee individually because it could only be exercised collectively, making it a "single right." In contrast, the individual members of NTEU and AFGE possess separate, distinct claims, an increase in their federal pay for the years in question. There is no "single right" at issue. Each member could sue individually for the increased pay he or she seeks.

The government also claims that venue is improper as to those plaintiffs not residing in the District of Columbia. The Tucker Act requires district court actions to be brought in the judicial district where the plaintiff resides. 28 U.S.C. § 1402(a)(1). Venue is proper as to NTEU, AFGE and those individual plaintiffs residing in the District of Columbia.[6] As to the remaining individual plaintiffs, their claims must be dismissed for improper venue.

II.

Defendants concede that the one-House legislative veto in the alternative pay plan section of the Pay Act is unconstitutional under *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). Thus, the issue before the Court is whether the unconstitutional legislative veto provision is severable

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[6] Haamid Nurridin in Civil Action No. 84-2654 and Thomas C. Lipscomb, Anita Longstreet and Cecilia Westray in Civil Action No. 83-1914.

from the remainder of the alternative pay plan portion, leaving the alternative pay plan intact.

Plaintiffs argue that the one-House legislative veto is an integral and necessary part of the alternative pay plan provision and that if the legislative veto is severed from the alternative pay plan procedure, the main purpose of the statute, comparability for federal employee salaries, would be subverted. Thus, they contend, it is inconceivable that Congress would have passed the alternative plan provision allowing the President to set federal pay rates without retaining direct veto authority over the President's recommendation. Defendants assert that the alternative pay plan, which was viewed by Congress as a vital safety valve in the pay setting process, remains fully operable without the one-House legislative veto since Congress retains authority to review and reject alternative pay plans through its power to legislate.

In *Chadha*, the Supreme Court reaffirmed the test for determining severability of an unconstitutional one-House veto provision. The Court stated that "the invalid portions of a statute are to be severed ' "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not." ' " *INS v. Chadha*, 462 U.S. at 932, 103 S.Ct. at 2774. Recently, this Circuit further explained this test in *Alaska Airlines, Inc. v. Donovan*, 766 F.2d 1550 (D.C.Cir.1985):

> Only if we conclude that Congress would not have included a provision absent the constitutionally flawed portion is that provision to fall. The issue cannot be whether Congress preferred the statute with the unconstitutional provision over the same statute without that provision. Manifestly, Congress' preference is abundantly clear from its inclusion of the unconstitutional provision. Nor is the question whether Congress would have passed some alternative

> version of the statute if it knew that it could not lawfully have included the offending provision. That is, "the question is not whether Congress would have enacted th[is] *exact* statute [] had it known at the time of enactment that the legislative veto provisions were invalid, but rather, whether Congress would have preferred th[is] statute [], after severance of the legislative veto provision [], to no statute [] at all." *Gulf Oil Corp. v. Dyke*, 734 F.2d 797, 804 (T.E.C.A.) (emphasis in original), *cert. denied*, [—— U.S. ——], 105 S.Ct. 173 [83 L.Ed.2d 108] (1984).

766 F.2d at 1560.

There is a presumption of severability of the unconstitutional provision if what remains after severance is fully operable as law. *INS v. Chadha*, 462 U.S. at 934, 103 S.Ct. at 2775; *Alaska Airlines, Inc. v. Donovan*, 766 F.2d at 1559. Plaintiffs thus have the burden of demonstrating that Congress would not have enacted the provision without the severed portion. *Alaska Airlines v. Donovan*, 766 F.2d at 1560. Moreover, plaintiffs' burden is made even more difficult by the well-established principle of statutory construction that it is the responsibility of the Court to save and not to destroy, consistent with legislative intent. *Id.* at 1560.[7]

Mindful of the foregoing principles, and based on its review of the legislative history of the Pay Act, the Court concludes that the unconstitutional one-House veto provision is severable from the alternative pay plan procedure. Plaintiffs have failed to meet their burden of demonstrating that Congress would not have enacted the alternative pay plan procedure without the legislative veto and that the alternative pay plan is not fully operable as law without the one-House veto.

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[7] It is unclear to what extent the absence of a severability clause, as in this case, affects the determination of whether a provision is severable. *Alaska Airlines, Inc. v. Donovan*, at 1559 n.7.

There is no persuasive evidence that Congress would have preferred no alternative pay plan provision at all to one without a one-House veto. Contrary to plaintiffs' characterization of the alternative pay plan as a limited exception to the principle of comparability which the plan was designed to achieve, the legislative history of the Pay Act indicates that it was an important "safety valve" and an integral part of the comprehensive scheme for setting federal employees' salaries. Congress recognized that comparability of pay adjustments for federal employees might not be feasible or in the nation's interest due to inflation, budget concerns, other economic conditions or national emergencies. (116 Cong.Rec. 44096, 44099, 44103, (1970)). It enacted the alternative pay plan provision to ensure against automatic comparability pay adjustments without consideration of economic realities.

Moreover, Congress would not have enacted a comprehensive scheme for pay adjustments for federal employees without providing an important role for the President, even absent the one-House veto. Without the alternative pay plan provision, the President's role would be reduced to merely a ministerial function of reporting to Congress the recommendations of his Pay Agent and the Advisory Committee on Federal Pay. Indeed, the alternative pay plan was proposed as a conference substitute after the Senate rejected an earlier House proposal that bypassed the President altogether and provided for a Federal Employee Salary Commission to recommend to Congress pay adjustments that would become effective upon Congressional approval. The alternative pay plan, even without the one-House veto, implements Congress' intent to relieve itself of the burden of setting federal pay on an annual basis, particularly in election years, and to establish general principles of pay comparability to be implemented by the Executive Branch.

Although the alternative pay plan provision received considerable attention during the floor debate on the Pay Act, there is little discussion of the one-House veto. Much of the criticism of the alternative pay plan was directed at Congress' perceived lack of choice in that it would be left with the pay agent's recommendations to implement if it rejected the President's plan. Instead of relying on the one-House veto, proponents of the alternative pay plan consistently refuted this argument by noting that Congress always had the option of passing a law if it didn't like the President's plan or the pay agent's recommendations. (116 Cong.Rec. 44100, 44101-02, 44104-05, 44284 (1970)). Even Representative Udall, who was one of the drafters of the conference committee substitute which contained the alternative pay plan provision and who viewed the one-House veto as a way to guarantee that Congress would have an opportunity to review the President's plan, recognized that the ultimate means for Congress to ensure control over the pay setting process was to exercise its authority to legislate. (116 Cong.Rec. 44284.)

What remains of the Pay Act without the one-House veto provision is fully operable as a law. If the President submits an alternative pay plan and Congress disagrees, Congress can enact legislation to set the pay adjustment at the level it desires. Indeed, Congress did that in 1984 when it passed the Omnibus Reconciliation Act of 1983, Pub. L. No. 98-270, 98 Stat. 157, which overrode the President's fiscal year 1984 alternative pay plan. Congress also retains oversight by requiring the President to report his alternative pay plan to Congress. Thus, contrary to plaintiffs' assertions, the President is not delegated virtually limitless authority to set federal salaries without any Congressional oversight or without general policy guidelines from Congress for determining pay adjustments.

III.

NTEU argues that even if the one-House veto is severable from the alternative pay plan provision, the 1985 fiscal year alternative pay plan violates the Pay Act because it provides for pay increases effective on the first day of the first applicable pay period beginning on or after January 1, 1985 instead of October 1, 1984, as required by the Pay Act. The Pay Act provides in pertinent part:

> An alternative plan transmitted by the President under paragraph (1) of this subsection becomes effective on the first day of the first applicable pay period commencing on or after October 1, of the applicable year.

5 U.S.C. § 5305(c)(2).

The plain meaning of the statute indicates that the pay plan becomes effective on or after October 1st and that pay adjustments provided for in the plan become effective as specified in the plan.[8] Moreover, dicta in *NTEU v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974) suggests that that Court found nothing illegal about the alternative pay plan President Nixon submitted to Congress on September 1, 1971, which provided for no salary increase for the first six months of fiscal year 1972 and for a comparability increase for the remainder of the year. Similarly, the fiscal year 1985 pay plan provides for no increase for GS employees for the first three months of the fiscal year and a 3.5% increase effective beginning the first date of the first applicable pay period beginning on or after January 1, 1985.

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[8] This Court previously interpreted the Pay Act in this manner when it denied AFGE's motion for preliminary injunction. Memorandum of October 21, 1983 at 3.

SUMMARY

This court has jurisdiction under the Tucker Act over the claims of AFGE, NTEU and the individual plaintiffs who reside in the District of Columbia. The claims of all of the members of AFGE and NTEU may not be aggregated to determine Tucker Act jurisdiction.

Applying the standard for severability established in *Chadha*, the Court holds that the unconstitutional one-House veto provision in Section 5305(c)(2) of the Pay Act is severable from the remainder of that section and the Pay Act. Accordingly, the alternative pay plan provision, without the one-House veto, is valid. The 1985 fiscal year alternative pay plan, which provides for a pay adjustment effective the first applicable pay period beginning on or after January 1, 1985, rather than October 1, 1984, is valid under the Pay Act.

ORDER

Upon consideration of defendants' motion for judgment on the pleadings in Civil Action No. 84-2654 and the parties' cross-motions for summary judgment in Civil Action Nos. 83-1914 and 84-2654, the memoranda in support thereof and in opposition thereto, oral arguments of counsel, and the entire record herein, and for the reasons set forth in the accompanying memorandum, it is by the Court this 31st day of July 1985,

ORDERED that defendants' motion for judgment on the pleadings in Civil Action No. 84-2654 be, and hereby is, denied; and it is further

ORDERED that defendants' motions for summary judgment in Civil Action Nos. 83-1914 and 84-2654, be, and hereby, are granted; and it is further

ORDERED that the claims of the individual plaintiffs in Civil Action 84-2654 who reside outside the District of Columbia be, and hereby are, dismissed for improper venue.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal Nos. 85-2649
85-2652

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, and NATIONAL TREASURY EMPLOYEES UNION, *et al.*,

Appellants,

v.

RONALD REAGAN, *et al.*,

Appellees.

Charles A. Hobbie, Deputy General Counsel, American Federation of Government Employees, AFL-CIO, of Washington, D.C., argued for Appellant AFGE. With him on the brief was *Mark D. Roth*, General Counsel. *Lois G. Williams*, Director of Litigation, National Treasury Employees Union, of Washington, D.C., argued for appellant NTEU. With her on the brief was *Richard S. Edelman*, Assistant Counsel.

Neil H. Koslowe, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for appellee. With him on the brief were *Richard K. Willard*, Assistant Attorney General, *Joseph Digenova*, United States Attorney and *Anthony J. Steinmeyer*, Assistant Director.

Appealed from: U.S. District Court
for the District of Columbia

Judge Gasch

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal Nos. 85-2649
85-2652

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, and NATIONAL TREASURY EMPLOYEES UNION, *et al.*,

Appellants,

v.

RONALD REAGAN, *et al.*,

Appellees.

DECIDED: December 2, 1986

Before NIES, *Circuit Judge*, NICHOLS, *Senior Circuit Judge*, and BISSELL, *Circuit Judge*.

BISSELL, *Circuit Judge*.

This is a consolidated appeal from the order of the district court, *National Treasury Employees Union v. Reagan*, 629 F. Supp. 762 (D.D.C. 1985), granting appellees' motion for summary judgment, on the grounds that, after severing an unconstitutional one-House veto provision from the Federal Pay Comparability Act of 1970, Pub. L. No. 91-656, 84 Stat. 1946 (1971) (the Pay Act), the alternative pay plan provision of the Act is not unconstitutional and that the federal pay plan implemented for fiscal year 1984 complied with the terms of the Act. Our jurisdiction of this appeal is derived from 28 U.S.C. § 1295(a)(2) (1982). We affirm.

BACKGROUND

The Pay Act provides a mechanism for the annual adjustment of the pay rates of federal employees in the statutory pay systems for the purpose of achieving pay comparability with employees in the private sector doing substantially equal work. Under the Act, the President appoints a pay agent who prepares an annual report comparing salaries of federal employees with salaries of private sector employees and recommending appropriate adjustments in federal salaries. The pay agent submits the report to the President and also to the Advisory Committee on Federal Pay. The Advisory Committee on Federal Pay reviews the report and makes additional recommendations to the President.

Based on the pay agent's report and the recommendations of the Advisory Committee on Federal Pay, the President is to adjust federal employees' pay in accordance with the principles of 5 U.S.C. § 5301(a) (1982) providing for pay comparability with the private sector. The President is required to transmit to Congress a report of the pay adjustment together with the pay agent's report and the report of the Advisory Committee on Federal Pay.

The Act provides an alternative plan for adjusting statutory pay rates. "If, because of national emergency or economic conditions affecting the general welfare" the President considers it "inappropriate to make the pay adjustment required" by 5 U.S.C. § 5305(a), the President may prepare and transmit to Congress an "alternative plan with respect to a pay adjustment as he considers appropriate, together with the reasons therefore, in lieu of the pay adjustments required" by section 5305(a). 5 U.S.C. § 5305(c)(1).

The Act also provides for a legislative veto of the alternative plan. The alternative plan submitted by the President becomes effective on the first day of the first applicable pay period commencing on or after October 1

of the applicable year and continues in effect unless, before the end of the first period of 30 calendar days of continuous session of Congress after the date the plan is transmitted, either House adopts a resolution disapproving it. 5 U.S.C. § 5305(c)(2). If either House adopts a resolution disapproving the alternative plan, the Act requires the President to adjust pay rates in accordance with section 5305(a)(2) and (3) "effective as of the beginning of the first applicable pay period commencing on or after the date on which the resolution is adopted, or on or after October 1, whichever is later." 5 U.S.C. § 5305(m).

For fiscal years, 1980, 1981, 1983, and 1985, the President submitted to Congress alternative plans proposing increases less than those recommended by his pay agent. Neither House of Congress disapproved and in each year the pay increase proposed by the President became effective. In fiscal year 1982, Congress enacted the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1701, 95 Stat. 357, 753, section 1701(a) of which provided for a cap of 4.8 percent on the adjustment of statutory pay rates under 5 U.S.C. § 5305. In fiscal year 1984, Congress enacted the Omnibus Budget Reconciliation Act of 1983, Pub. L. No. 98-270, § 202, 98 Stat. 157, 158 (1984), section 202(a)(1) of which provided that the adjustment to statutory pay rates under 5 U.S.C. § 5305 would be 4 percent.

Appellants American Federation of Government Employees, AFL-CIO (AFGE) and National Treasury Employees Union (NTEU) are unincorporated associations based in Washington, D.C. AFGE and NTEU are the exclusive bargaining representatives of federal employees whose pay was adjusted under alternative pay plans submitted by the President in 1980, 1981, 1983, and 1985. The other named appellants are members of AFGE and NTEU who reside in Washington, D.C.

This matter came before the district court on the defendants' motion for judgment on the pleadings in *NTEU v. Reagan* and on cross motions for summary judgment in both cases. The district court denied the defendants' motion for judgment on the pleadings, denied the plaintiffs' motions for summary judgment, and granted the defendants' motions for summary judgment in both cases.

All parties agreed that under *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), the one-House veto provision of the Act was unconstitutional. The district court concluded that the one-House veto provision was severable from the alternative pay plan provision because the provisions of the Act remaining after severance were fully operable as law, and the legislative history of the Pay Act did not demonstrate that Congress would not have enacted the alternative pay plan procedure without the one-House veto provision. The district court concluded that the alternative pay plan, absent the one-House veto provision, was not an unconstitutional delegation of legislative authority. The district court also rejected AFGE's argument that the 1985 alternative pay plan violated 5 U.S.C. § 5305(c)(2) because the plan increased pay on January 1, 1985, rather than in October 1984.

ISSUES

The issues presented on appeal are:

(1) Whether the Pay Act, without a one-House veto provision, articulates policies or standards sufficient to confine the President's discretion in prescribing an alternative pay plan.

(2) Whether the legislative history of the Pay Act evidences that Congress would not have delegated to the President the authority to prescribe an alternative plan for adjusting federal employees' pay without providing for a one-House veto of the alternative plan.

(3) Whether the alternative pay plan for fiscal year 1984 violated the Pay Act by not implementing a pay increase until later than the first pay period after October 1, 1984.

OPINION

I

All parties agree that in light of the *Chadha* decision, the one-House veto provision contained in section 5305 (c) (2) is unconstitutional. Based on *Chadha*, appellants argue that upon severance of the one-House veto provision from the Act, the alternative pay plan provision must be severed as well. They argue that, without the one-House veto provision, the alternative pay plan cannot stand because it would improperly delegate legislative authority to the President and would violate congressional intent. Appellants ask this court to declare the alternative pay plan unconstitutional and to make the decision retroactive so that government employees covered by the Pay Act may receive the full comparability pay increases recommended by the pay agent for fiscal years 1980, 1981, 1983, and 1985.

In *Chadha*, the Supreme Court held one-House vetoes unconstitutional. The Court considered whether it could sever the offending one-House veto provision of the Immigration and Nationality Act from the remainder of the Act. The Court stated as the general rule of severability that "invalid portions of a statute are to be severed '[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.'" *Chadha*, 462 U.S. at 931-32 (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976)). The Court went on to explain that: "[a] provision is further presumed severable if what remains after severance 'is fully operative as a law.'" *Id.* at 934 (quoting *Champlin Refining Co. v. Corporation Comm'n of Oklahoma*, 286 U.S. 210, 234 (1932)).

Since the one-House veto applies only to the alternative pay plan provision and not to the remainder of the Act we must consider whether the alternative pay plan, stripped of the one-House veto, is within Congress' power to enact. If it is not, we need proceed no further. We need not address the question whether the remainder of the Act is within Congress' power to enact because the one-House veto does not apply to it and because neither party disputes the legality of any provision of the Act other than the one-House veto and the alternative pay plan provision.

The appellants argue that, without the one-House veto, the alternative pay plan is an improper delegation of legislative power to the President and, therefore, that the alternative pay plan is beyond Congress' power to enact. The delegation doctrine is an aspect of the constitutional principle of separation of powers. The limitation on Congress' ability to delegate legislative power to the executive branch was early recognized by the Supreme Court. *Field v. Clark*, 143 U.S. 649 (1892).

The Court has summarized the delegation doctrine as follows:

> Only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress had been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose . . . .

Yakus v. United States, 321 U.S. 414, 426 (1944).

Thus, assuming that the President's power to set pay levels requires guidelines, the issue is whether the alternative pay plan provision provides a sufficient description of the policies and standards circumscribing the President's actions to determine whether he has obeyed the will of Congress. To make this determination we

will compare the responsibilities under the alternative pay plan with legislative delegations that have previously been held valid.

The President may submit an alternative pay plan only when "because of national emergency or economic conditions affecting the general welfare, the President [considers] . . . it inappropriate to make the pay adjustment required" to achieve full comparability. 5 U.S.C. § 5305(c)(1). Under such conditions the President "shall prepare and transmit to Congress before September 1 of that year such alternative plan with respect to a pay adjustment as he considers appropriate, together with the reasons therefor . . . ." *Id.* The report must "specify the overall percentage of the adjustment in the rates of pay under the General Schedule and of the adjustments in the rates of pay under the other statutory pay systems." *Id.* The alternative pay plan provision specifies why the plan is to be prepared, when the plan must be submitted, and what it must contain. It is implicit in the section that the pay adjustment in the alternative plan will be lower than that required by section 5305(a).

The standards for submission of an alternative plan are more specific than the provisions of other statutes with respect to which the delegation of authority has been upheld. In *Yakus v. United States*, for example, the Emergency Price Control Act of January 30, 1942, delegated to the Price Administrator authority to fix prices of commodities that " 'in his judgment will be generally fair and equitable and will effectuate the purposes of this Act.' " *Yakus*, 321 U.S. at 420 (quoting Emergency Price Control Act of January 30, 1942, Pub. L. No. 77-421, § 202(a), 56 Stat. 23). The Court held that the statement of policy contained in the Act sufficiently constrained the Administrator's judgment. *Id.* at 423. In *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), the Supreme Court considered whether the regu-

latory authority delegated to the Federal Communications Commission under the Communications Act of 1934 was an unconstitutional delegation. The Court found that the standard of " 'public interest, convenience, or necessity' " contained in the Act. *Id.* at 215-16 (*quoting* Communications Act of 1934, Pub. L. No. 73-416, §§ 307 (a) (d), 309(a), 310, 312, 48 Stat. 1064, 1083-87 (1934). In both *Yakus* and *National Broadcasting*, the standards limiting administrative action, while sufficient to determine compliance with legislative intent, were less specific than those provided by Congress in the Pay Act. We conclude that the Act prescribes sufficient standards to guide the President in submitting an alternative pay plan. *Cf. Atkins v. United States*, 556 F.2d 1028, 1060 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978) (Establishment of pay scales "though legislative in character, can be delegated under proper standards, at least so long as Congress retains the ultimate authority."). Since the alternative pay plan provision is not an improper delegation of authority to the President, we conclude that it is within Congress' power to enact.

II

Having addressed the question whether Congress was empowered to enact the alternative pay plan absent a one-House veto provision, we now consider whether Congress would have done so. In *Chadha*, determining that the legislature would have enacted the remainder of the Act without a one-House veto provision was a relatively easy task. Section 406 of the Immigration and Nationality Act provided that the remainder of the Act would not be affected by the severance of any particular provision of the Act.

Where, as here, the Act itself does not address the question of severability, the offending provision is presumed severable if what remains after severance is fully administratively operable as a law. The appellants may

overcome the presumption of severability by showing that it is evident from the legislative history that Congress would not have passed the alternative pay plan without the one-House veto provision. *See Regan v. Time, Inc.*, 468 U.S. 641, 652-53 (1984) (plurality opinion); *Alaska Airlines, Inc. v. Donovan*, 766 F.2d 1550, 1559-61 (D.C. Cir. 1985), *cert. granted*, 106 S. Ct. 1259 (1986).*

It is clear that the entire Act, including section 5305 (c)(1), allowing the President to submit an alternative plan under certain prescribed conditions, is fully administratively operable as law absent the one-House veto provision in section 5305(c)(2). Thus, the presumption of severability arises.

Appellants argue that preserving the alternative pay plan while severing the one-House veto provision is inconsistent with the Act's policies. We agree that the dominant legislative policy behind the Pay Act was to maintain comparability between federal pay rates and those in private enterprise. 5 U.S.C. § 5301(a)(3). It is also evident from the legislative history that implementing an automatic mechanism for providing pay com-

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* On the issue of severability, appellants argue that we should be guided by the result reached by the Fourth Circuit in *McCorkle v. United States*, 559 F.2d 1258, 1261-62 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978). We decline such guidance for two reasons. First, *McCorkle* dealt with the severability of a one-House veto provision from the Federal Salary Act of 1967, Pub. L. No. 90-206, § 225(i), 81 Stat. 613, 644. In *McCorkle*, the court based its decision solely on the legislative history of the Federal Salary Act, and did not address the legislative history of the Pay Act, which is in question here. Second, to the extent we consider analysis of the severability of a provision of the Federal Salary Act helpful in resolving the questions before us, we find the analysis of Senior Judge Skelton's dissent in *Atkins v. United States*, 556 F.2d 1028, 1082-99 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978) more persuasive than that in *McCorkle*. Judge Skelton's dissent is essentially the analysis in *Chadha*.

parability was a major goal of the legislation. 116 Cong. Rec. 44,099-100 (1970) (statements of Sen. McGee); *id.* at 44,284-286 (statements of Rep. Udall). It appears, however, that Congress was unwilling to apply the principle of full comparability automatically without some mechanism for limiting pay adjustments during periods of economic hardship. As Senator McGee explained:

> It was our feeling that comparability should be arrived at as a judgment in a far more scientific way than we have been prone to do up until now, and that in arriving at what is comparability, we have essentially removed the need for any critical serious judgment factor except in a national crisis of some sort, including an inflationary crisis, in which there is that reserve for the President of the United States.

116 Cong. Rec. 44,103.

Congress anticipated that the alternative pay plan would provide the necessary flexibility in an otherwise essentially automatic process. *See* 116 Cong. Rec. 44,101-102 (statements of Sens. McGee and Holland); *id.* at 44,284-286 (statements of Rep. Udall). The legislative history and the presence of the alternative pay plan in the Act lead us to conclude that Congress did not intend to implement comparability pay increases at any cost. Rather, it chose to provide an executive alternative to full comparability pay increases for years in which national emergency or economic conditions affecting the general welfare make full comparability impractical. Furthermore, it appears that the Nixon administration supported an active pay-setting role for the President. Without such a provision, it is likely that a substantial number of members of Congress would not have voted for the Pay Act. *See* 116 Cong. Rec. 44,283 (statements of Reps. Ford and Udall); *id.* at 44,105 (statements of Sen. McGee).

We reject appellants' argument that without the one-House veto the President has "unchecked" authority to set federal pay levels. Congress recognized that if it did not approve of an alternative pay plan submitted by the President, it had the choice of exercising its one-House veto or legislating a pay plan different from either the alternative recommended by the President or the recommendation of the pay agent. The legislative option was clearly understood by the Senate and House sponsors of the conference committee report containing the conference substitute that ultimately became the Pay Act. 116 Cong. Rec. 44,100-102, 44104-105 (statements of Senator McGee); *id.* at 44,284 (statements of Rep. Udall). Nor has Congress been reluctant to use its legislative power to enact a comparability increase different from that proposed by the President. *See* Omnibus Budget Reconciliation Act of 1983, Pub. L. 98-270, § 202, 98 Stat. 157, 158 (1984).

The appellants argue that congressional ability to override the President's alternative pay recommendation legislatively is inhibited by the President's power to veto the legislation. This argument ignores the political reality that such overriding legislation is typically part of much more sweeping legislation that the President would not be likely to veto. Furthermore, the argument ignores the fact that Congress has enacted such legislation in the past.

Congressional activity in the federal pay area after *Chadha* sheds light on Congress' intent. *Chadha* was decided on June 23, 1983. On October 31, 1983, the President submitted to Congress an alternative pay plan for fiscal year 1984. Congress was aware of the impact of *Chadha* on the Pay Act's one-House veto provision when it considered overriding the President's alternative pay plan in the Omnibus Budget Reconciliation Act of 1983, Pub. L. No. 98-270, 98 Stat. 158 (1984). *See* H.R. Rep. No. 425, 98th Cong., 2d Sess. 5-7, *reprinted in* 1984 U.S.

Code Cong. & Ad. News 355, 359-61. Despite the fact that Congress had reason to know that *Chadha* had invalidated the Pay Act's one-House veto provision, and that Congress was enacting new legislation adjusting federal pay, it did not take the opportunity to strike the alternative pay plan provision from the Pay Act. Nor has Congress done so in the Comprehensive Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 15201, 100 Stat. 82, 332 (1986). If, as the appellants maintain, the legislative will was as strongly opposed to granting the President authority to submit an alternative pay plan without the check of a one-House veto, it would be expected that in the years following *Chadha* Congress would have amended the Pay Act to eliminate the alternative pay plan provision.

Prior to the *Chadha* decision, Congress had, but did not use, its legislative veto. After the *Chadha* decision, Congress had, but has used only in 1984, the power to legislate a pay adjustment different from that proposed in the President's alternative pay plan. When Congress has failed to increase federal pay beyond the President's recommendations or to eliminate the alternative pay plan, this court will not presume to do so under the guise of discerning legislative intent. Although the legislative history may be subject to varying interpretations, viewing that legislative history as a whole, we are not persuaded that Congress would not have enacted the alternative pay plan without the one-House veto.

III

Appellant AFGE contends that the alternative pay plan for fiscal year 1984 violates 5 U.S.C. § 5305(c)(2). Section 5305(c)(2) provides that: "An alternative plan transmitted by the President under paragraph (1) of this subsection becomes effective on the first day of the first applicable pay period commencing on or after Octo-

ber 1 of the applicable year," unless either House of Congress exercises its legislative veto. The fiscal year 1984 alternative plan provided for a pay adjustment effective January 1, 1985.

Section 5305(c)(2) does not provide that pay will be adjusted on the first day of the first applicable pay period commencing on or after October 1. Rather, it provides that an alternative plan transmitted by the President to Congress becomes effective on that date. Nothing in the Act requires the conclusion that an alternative plan must make a pay adjustment on the same date the plan becomes effective.

Congress' acts relating to pay comparability after the enactment of the Pay Act support this interpretation. In fiscal year 1984 the President submitted an alternative pay plan increasing rates of pay by 3.5 percent. Congress enacted legislation increasing rates of pay by 4 percent. In section 202 of the Omnibus Budget Reconciliation Act of 1983, Pub. L. No. 98-270, 98 Stat. 157, 158 (1984), Congress not only provided for an increase in the rate of pay but also provided that it would not be effective until "the first day of the first applicable pay period commencing on or after January 1 of such fiscal year." Likewise, in the Comprehensive Omnibus Reconciliation Act of 1985, Pub. L. No. 99-272, § 15201, 100 Stat. 82, 332 (1986), Congress opposed the President's alternative pay plan for fiscal year 1986 and placed limitations on federal pay increases in fiscal years 1987 and 1988. Section 15201(a)(2)(B)(ii) of the Act specifically makes pay adjustments to be made in 1987 and 1988 effective on or after January 1 of those fiscal years. Thus, presuming Congress has acted consistently with the Pay Act. it is evident that the Act was not intended to prevent the delay of a pay adjustment within a particular fiscal year.

CONCLUSION

Accordingly, we hold that the Pay Act supplies adequate indication of congressional policies and standards to limit the President's discretion in proposing an alternative pay plan; that the one-House veto provision is severable from all of the remainder of the Pay Act; and that the alternative pay plan for the 1984 fiscal year complies with the Act. The district court's judgment is affirmed.

AFFIRMED

APPENDIX C

FEDERAL PAY COMPARABILITY ACT OF 1970

5 U.S.C. § 5301. Policy

(a) It is the policy of Congress that Federal pay fixing for employees under statutory pay systems be based on the principles that—

(1) there be equal pay for substantially equal work;

(2) pay distinctions be maintained in keeping with work and performance distinctions;

(3) Federal pay rates be comparable with private enterprise pay rates for the same levels of work; and

(4) pay levels for the statutory pay systems be interrelated.

(b) The pay rates of each statutory pay system shall be fixed and adjusted in accordance with the principles under subsection (a) of this section and the provisions of sections 5305, 5306, and 5308 of this title.

(c) For the purpose of this subchapter, "statutory pay system" means a pay system under—

(1) subchapter III of this chapter, relating to the General Schedule;

(2) subchapter IV of chapter 14 of title 22, relating to the Foreign Service of the United States; or

(3) chapter 73 of title 38, relating to the Department of Medicine and Surgery, Veterans' Administration.

5 U.S.C. § 5305. Annual pay reports and adjustments

(a) In order to carry out the policy stated in section 5301 of this title, the President shall—

(1) direct such agent as he considers appropriate to prepare and submit to him annually, after considering such views and recommendations as may be submitted under the provisions of subsection (b) of this section, a report that—

(A) compares the rates of pay of the statutory pay systems with the rates of pay for the same levels of work in private enterprise as determined on the basis of appropriate annual surveys that shall be conducted by the Bureau of Labor Statistics;

(B) makes recommendations for appropriate adjustments in rates of pay; and

(C) includes the views and recommendations submitted under the provisions of subsection (b) of this section;

(2) after considering the report of his agent and the findings and recommendations of the Advisory Committee on Federal Pay reported to him under section 5306(b)(3) of this title, adjust the rates of pay of each statutory pay system in accordance with the principles under section 5301(a) of this title, effective as of the beginning of the first applicable pay period commencing on or after October 1 of the applicable year; and

(3) transmit to Congress a report of the pay adjustment, together with a copy of the report submitted to him by his agent and the findings and recommendations of the Advisory Committee on Federal Pay reported to him under section 5306(b)(3) of this title. The report transmitted to the Congress under this subsection shall specify the overall percentage of the adjustment in the rates of pay under the General Schedule and of the adjustment in the rates of pay under the other statutory pay systems.

(b) In carrying out its functions under subsection (a)(1) of this section, the President's agent shall—

(1) establish a Federal Employees Pay Council of 5 members who shall not be deemed to be employees of the Government of the United States by reason of appointment to the Council and shall not receive pay by reason of service as members of the Council, who shall be representatives of employee organizations which represent substantial numbers of employees under the statutory pay systems, and who shall be selected with due consideration to such factors as the relative numbers of employees represented by the various organizations, but not more than 3 members of the Council at any one time shall be from a single employee organization, council, federation, alliance, association, or affiliation of employee organizations;

(2) provide for meetings with the Federal Employees Pay Council and give thorough consideration to the views and recommendations of the Council and the individual views and recommendations, if any, of the members of the Council regarding—

(A) the coverage of the annual survey conducted by the Bureau of Labor Statistics under subsection (a)(1) of this section (including, but not limited to, the occupations, establishment sizes, industries, and geographical areas to be surveyed);

(B) the process of comparing the rates of pay of the statutory pay systems with rates of pay for the same levels of work in private enterprise; and

(C) the adjustments in the rates of pay of the statutory pay systems that should be made to achieve comparability between those rates

and the rates of pay for the same levels of work in private enterprise.

(3) give thorough consideration to the views and recommendations of employee organizations not represented on the Federal Employees Pay Council regarding the subjects in paragraph (2)(A)-(C) of this subsection; and

(4) include in its report to the President the views and recommendations submitted as provided in this subsection by the Federal Employees Pay Council, by any member of that Council, and by employee organizations not represented on that Council.

(c)(1) If, because of national emergency or economic conditions affecting the general welfare, the President should, in any year, consider it inappropriate to make the pay adjustment required by subsection (a) of this section, he shall prepare and transmit to Congress before September 1 of that year such alternative plan with respect to a pay adjustment as he considers appropriate, together with the reasons therefor, in lieu of the pay adjustments required by subsection (a) of this section. The report transmitted to the Congress under this subsection shall specify the overall percentage of the adjustment in the rates of pay under the General Schedule and of the adjustment in the rates of pay under the other statutory pay systems.

(2) An alternative plan transmitted by the President under paragraph (1) of this subsection becomes effective on the first day of the first applicable pay period commencing on or after October 1 of the applicable year and continues in effect unless, before the end of the first period of 30 calendar days of continuous session of Congress after the date on which the alternative plan is transmitted, either House adopts a resolution disapproving the alternative plan so recommended and submitted, in which case the pay adjustments for the statutory pay systems shall be made effective as provided by subsection

(m) of this section. The continuity of a session is broken only by an adjournment of the Congress sine die, and the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of the 30-day period.

(d) Subsections (e)-(k) of this section are enacted by Congress—

(1) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they are deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in the House in the case of resolutions described by this section; and they supersede other rules only to the extent that they are inconsistent therewith; and

(2) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.

(e) If the committee, to which has been referred a resolution disapproving the alternative plan of the President, has not reported the resolution at the end of 10 calendar days after its introduction, it is in order to move either to discharge the committee from further consideration of the resolution or to discharge the committee from further consideration of any other resolution with respect to the same plan which has been referred to the committee.

(f) A motion to discharge may be made only by an individual favoring the resolution, is highly privileged (except that it may not be made after the committee has reported a resolution with respect to the same recommendation), and debate thereon is limited to not more than 1 hour, to be divided equally between those favor-

ing and those opposing the resolution. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(g) If the motion to discharge is agreed to, or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other resolution with respect to the same alternative plan.

(h) When the committee has reported, or has been discharged from further consideration of, a resolution with respect to an alternative plan, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion is highly privileged and is not debatable. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(i) Debate on the resolution is limited to not more than 2 hours, to be divided equally between those favoring and those opposing the resolution. A motion further to limit debate is not debatable. An amendment to, or motion to recommit, the resolution is not in order, and it is not in order to move to reconsider the vote by which the resolution is agreed to or disagreed to.

(j) Motions to postpone, made with respect to the discharge from committee, or the consideration of, a resolution with respect to an alternative plan, and motions to proceed to the consideration of other business, are decided without debate.

(k) Appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a resolution with respect to an alternative plan are decided without debate.

(l) The rates of pay which become effective under this section are the rate of pay applicable, to each position concerned, and each class of positions concerned, under a statutory pay system.

(m) If either House adopts a resolution disapproving an alternative plan submitted under subsection (c) of this section, the President shall take the action required by paragraphs (2) and (3) of subsection (a) of this section and adjust the rates of pay of the statutory pay systems effective as of the beginning of the first applicable pay period commencing on or after the date on which the resolution is adopted, or on or after October 1, whichever is later.

(n) The rates of pay that take effect under this section shall modify, supersede, or render inapplicable, as the case may be, to the extent inconsistent therewith—

(1) all provisions of law enacted prior to the effective date or dates of all or part (as the case may be) of the increases; and

(2) any prior recommendations or adjustments which took effect under this section or prior provisions of law.

(o) The rates of pay that take effect under this section shall be printed in the Federal Register and the Code of Federal Regulations.

(p) An increase in rates of pay that takes effect under this section is not an equivalent increase in pay within the meaning of section 5335 of this title.

(q) Any rate of pay under this section shall be initially adjusted, effective on the effective date of the rate of pay, under conversion rules prescribed by the President or by such agencies as the President may designate.

(r) This section does not impair any authority pursuant to which rates of pay may be fixed by administrative action.

§ 5306. Advisory Committee on Federal Pay

(a) There is established as an independent establishment an Advisory Committee on Federal Pay, to be composed of 3 members, not otherwise employed in the Government of the United States, appointed by the President. The Director of the Federal Mediation and Conciliation Service shall, and other interested parties may, recommend to the President for his consideration persons generally recognized for their impartiality, knowledge, and experience in the field of labor relations and pay policy to serve as members. The President shall designate one of the members as Chairman. Each appointment shall be for a term of 6 years, except that one of the original members shall be appointed for a term of 2 years, and another for a term of 4 years. A member appointed to fill a vacancy occurring before the end of the term of his predecessor shall serve for the remainder of that term. When the term of a member ends, he may continue to serve until his successor is appointed.

(b) To assist the President in carrying out the policy under section 5301 of this title, the Committee shall—

(1) review the annual report of the President's agent;

(2) consider such further views and recommendations with respect to the analysis and pay proposals contained in the annual report of the President's agent as may be presented to it in writing by employee organizations, the President's agent, other officials of the Government of the United States, and such experts as it may consult; and

(3) report its findings and recommendations to the President.

(c) The Committee may secure from any Executive agency or military department information, suggestions, estimates, statistics, and technical assistance for the

purpose of carrying out its functions. Each such Executive agency or military department shall furnish the information, suggestions, estimates, statistics, and technical assistance directly to the Committee on request of the Committee.

(d) On request of the Committee the head of any Executive agency or military department may detail, on a reimbursable basis, and of its personnel to assist the Committee in carrying out its functions.

(e) The Administrator of General Services shall provide administrative support services for the Committee on a reimbursable basis.

(f) The Committee may obtain services of experts or consultants in accordance with section 3109 of this title but at rates for individuals not to exceed that of the highest rate of basic pay then currently being paid under the General Schedule of subchapter III of this chapter.

(g) Each member of the Committee is entitled to pay at the daily equivalent of the annual rate of basic pay of level IV of the Executive Schedule for each day he is engaged on work of the Committee, and is entitled to travel expenses, including a per diem allowance, in accordance with section 5703(b) of this title.

(h) The Committee may appoint and fix the pay of such personnel as may be necessary to carry out its functions.

No. 86-1349

In the Supreme Court of the United States

OCTOBER TERM, 1986

NATIONAL TREASURY EMPLOYEES UNION, ET. AL.,
PETITIONERS

v.

RONALD REAGAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the unconstitutional legislative veto provision in the section of the Federal Pay Comparability Act of 1970 that authorizes the President to prepare an alternative pay plan in certain circumstances is severable from the remainder of that section.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15a-29a) is reported at 806 F.2d 1034. The opinion of the district court (Pet. App. 1a-14a) is reported at 629 F. Supp. 762.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 1986, and the petition for a writ of certiorari was filed on February 18, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Federal Pay Comparability Act of 1970, 5 U.S.C. 5301 *et seq.*, are set forth at Pet. App. 30a-38a.

STATEMENT

1. The Federal Pay Comparability Act of 1970, 5 U.S.C. 5301 *et seq.* (the Pay Act), provides a statutory mechanism for adjusting the rates of pay of federal employees covered by various statutory pay systems. The Pay Act provides that it is the policy of Congress that statutory pay systems be based on the following principles: (1) that there be equal pay for equal work, (2) that pay distinctions be maintained in keeping with work and performance distinctions, (3) that federal pay rates be comparable with private enterprise pay rates for the same levels of work, and (4) that the pay levels for the various statutory pay systems be interrelated. 5 U.S.C. 5301(a).

- The Act generally authorizes the President to make annual "comparability" adjustments in federal pay rates under the standards contained in 5 U.S.C. 5301(a), based on the report of a designated pay "agent" and the recommendations of the Advisory Committee on Federal Pay. 5 U.S.C. 5305(a) and (b). However, the Pay Act also provides an alternative method for the adjustment of pay. "If, because of national emergency or economic conditions affecting the general welfare, the President should, in any year, consider it inappropriate to make a pay adjustment" under the standards just described, the President is authorized to prepare and transmit to Congress, before September 1 of that year, "such alternative plan with respect to a pay adjustment as he considers appropriate," together with "the reasons therefor." 5 U.S.C. 5305(c)(1). The Act then specifies that this alternative plan "becomes effective" at the beginning of the first applicable pay period on or after October 1, unless either House of Congress adopts a resolution "disapproving" the plan within 30 legislative days of its transmittal. In that event, the President is required to implement the comparability adjustments indicated by the factors in 5 U.S.C. 5301(a).

2. Petitioners, two labor organizations representing federal employees and several individual federal employees, brought this action in the United States District Court for the District of Columbia to challenge alternative pay plans that were prepared by the President for fiscal years 1980, 1981, 1983 and 1985 (Pet. App. 4a).[1] Petitioners contended (and respondents agreed) that the one-House legislative veto provision in 5 U.S.C. 5305(c)(2) is unconstitutional under this Court's decision in *INS* v. *Chadha*, 462 U.S. 919 (1983). Petitioners further contended that the one-House veto provision is inseverable from the remainder of the alternative pay plan provisions in the Pay Act, but that the comparability adjustment provisions of the Pay Act survive (Pet. App. 9a, 20a). Accordingly, petitioners contended that the alternative pay plans that were prepared and formally transmitted by the President to Congress—and that were then placed in effect by Executive Order of the President after Congress failed to disapprove them—were invalid (see Pet. App. 4a-5a).

In a decision dated July 31, 1985, the district court rejected petitioners' challenge to the pay plans for fiscal years 1980, 1981, 1983 and 1985 (Pet. App. 1a-14a).[2] Relying on the severability analysis in *Chadha* and in the District of Columbia Circuit's opinion in *Alaska Airlines, Inc.* v. *Donovan*, 766 F.2d 1550 (1985), aff'd No. 85-920

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[1] Petitioners National Treasury Employees Union, et al. (NTEU) challenged only the alternative pay plan for fiscal year 1985 (Pet. App. 4a).

[2] The district court rejected respondents' contention that the Claims Court had exclusive jurisdiction over petitioners' claims (Pet. App. 5a-8a). Respondents did not raise that jurisdictional issue in the court of appeals. The district court also rejected the contention of petitioners American Federation of Goverment Employees, *et al.* (AFGE), that the alternative pay plan implemented by the President for fiscal year 1985 was defective as a statutory matter (*id.* at 13a). The court of appeals affirmed that statutory holding (*id.* at 27a-28a), and petitioners do not raise that issue here.

(Mar. 25, 1987), the court held that petitioners had failed to carry their burden of demonstrating that Congress would not have enacted the alternative pay plan provisions of the Pay Act without the legislative veto provision. The court therefore held that the legislative veto provision in the Pay Act is severable from the remainder of the Act (Pet. App. 8a-12a). The court explained (*id.* at 11a):

> There is no persuasive evidence that Congress would have preferred no alternative pay plan provision at all to one without a one-House veto. Contrary to plaintiffs' characterization of the alternative pay plan as a limited exception to the principle of comparability which the plan was designed to achieve, the legislative history of the Pay Act indicates that it was an important "safety valve" and an integral part of the comprehensive scheme for setting federal employees' salaries. Congress recognized that comparability of pay adjustments for federal employees might not be feasible or in the nation's interest due to inflation, budget concerns, other economic conditions or national emergencies (116 Cong. Rec. 44096, 44099, 44103 (1970)). It enacted the alternative pay plan provision to ensure against automatic comparability pay adjustments without consideration of economic realities.

The district court further concluded on the basis of its study of the legislative history that "Congess would not have enacted a comprehensive scheme for pay adjustments for federal employees absent providing an important role for the President, even without the one-House veto" (Pet. App. 11a). Yet "[w]ithout the alternative pay plan provision," the court observed, "the President's role would be reduced to merely a ministerial function of reporting to Congress the recommendations of his Pay Agent and the Advisory Committee on Federal Pay" (*ibid.*).

Finally, the court observed that although the alternative pay plan provision received considerable attention during the floor debate on the Pay Act, there was little discussion of the one-House veto provision. In this regard, the court noted that much of the criticism of the alternative pay plan provision was directed to the fact that Congress would be left with the statutory comparability pay raise if one House disapproved the President's alternative plan. Significantly, the court noted, proponents of the alternative pay plan approach "consistently refuted this argument by noting that Congress always had the option of passing a law if it didn't like the President's plan or the pay agent's recommendations" (Pet. App. 12a (citations omitted)).

3. A unanimous panel of the court of appeals affirmed (Pet. App. 15a-29a).[3]

a. The court of appeals first rejected petitioners' contention that the alternative pay plan constituted "an improper delegation of legislative power to the President," and therefore could not stand if stripped of the legislative veto (Pet. App. 21a-23a). Following the delegation analysis in *Yakus* v. *United States*, 321 U.S. 414 (1944), and *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943), the court of appeals held that the alternative pay plan provisions contain standards sufficient to guide and limit Executive action and to determine compliance with congressional intent. The court noted, for example, that the Act specifies that an alternative pay plan may be put into effect only on specified conditions: if the Presi-

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[3] Petitioners AFGE initially took an appeal to this Court from the district court's judgment. On December 2, 1985, the Court granted respondents' motion to dismiss that appeal for lack of jurisdiction. *AFGE* v. *Reagan*, No. 85-551. Petitioners NTEU initially took an appeal to the United States Court of Appeals for the District of Columbia Circuit. On December 20, 1985, that court granted respondents' motion to dismiss the appeal for lack of jurisdiction. *NTEU* v. *Reagan*, No. 85-5858.

dent finds a comparability adjustment inappropriate "because of national emergency or economic conditions." 5 U.S.C. 5305(c)(1). The court also noted that the Act prescribes procedures the President must follow in establishing the alternative adjustment he deems "appropriate," including the furnishing of a statement of reasons. Pet. App. 22a. On this basis, the court of appeals found that "[t]he standards for submission of an alternative plan are more specific than the provisions of other statutes with respect to which the delegation of authority has been upheld" (*ibid.*).

b. "Having addressed the question whether Congress was empowered to enact the alternative pay plan absent a one-House veto provision," the court of appeals next "consider[ed] whether Congress would have done so" if it had known that the one-House veto provision was unconstitutional (Pet. App. 23a). See *id.* at 23a-27a. Following *Chadha*, the D.C. Circuit's opinion in *Alaska Airlines*, and the plurality opinion in *Regan* v. *Time, Inc.*, 468 U.S. 641, 652-653 (1984), the court stated that the one-House veto provision must be found severable unless it is "evident from the legislative history that Congress would not have passed the alternative pay plan without the one-House veto provision" (Pet. App. 24a). In this case, the court concluded that petitioners had not shown that it is evident that Congress would not have enacted the alternative pay plan. First, the court found it "clear that the entire Act, including section 5305(c)(1), allowing the President to submit an alternative plan under certain prescribed conditions, is fully administratively operable as law absent the one-House veto provision in section 5305(c)(2)" (Pet. App. 24a). Second, the court found that although pay comparability was an important objective of the 1970 Act, "Congress was unwilling to apply the principle of full comparability automatically without some mechanism for limiting pay adjustments during periods of economic

hardship" (*id.* at 24a-25a). Congress therefore "anticipated that the alternative pay plan would provide the necessary flexibility in an otherwise essentially automatic process" (*id.* at 25a). The court also noted that the Administration supported an active paysetting role for the President, and that "[w]ithout such a provision, it is likely that a substantial number of members of Congress would not have voted for the Pay Act" (*ibid.*). The court also stressed that, as Congress recognized when it passed the Pay Act, Congress retains the option of legislating its own pay plan for the fiscal year if it is dissatisfied with both the comparability adjustment and the President's alternative pay plan. For example, the court observed, Congress overrode the President's alternative pay plan for fiscal year 1984 when it enacted the Omnibus Budget Reconciliation Act of 1983, Pub. L. No. 98-270, 98 Stat. 157, and the legislative history of that Act establishes that Congress was aware of the impact of *Chadha* on the one-House veto provision. Pet. App. 26a-27a (citing H.R. Rep. 98-425, 98th Cong., 2d Sess. 5-7 (1984)).

ARGUMENT

The decision of the court of appeals is correct and is fully consistent with this Court's decisions in *INS* v. *Chadha*, 462 U.S. 919 (1983), and *Alaska Airlines, Inc.* v. *Brock*, No. 85-920 (Mar. 25, 1987). The severability question depends at bottom on an interpretation of the particular statutory provisions involved, and there is no circuit conflict regarding the interpretation of the Pay Act provisions at issue here. The suggestion that Congress would have wanted the invalidation of the legislative veto to result in a large federal pay raise is implausible in the highest degree. Since *Chadha* was decided, Congress has effectively ratified the actual pay raises for the fiscal years in question, and has acknowledged the President's continued use of the alternative pay plan authority. Review by the Court therefore is not warranted.

1. a. The principles governing the severability issue in this case are firmly rooted in this Court's precedents and were recently reiterated by the Court in *Alaska Airlines*, slip op. 5-6:

> "[A] court should refrain from invalidating more of the statute than is necessary . . . . '[W]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid.' " *Regan* v. *Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion), quoting *El Paso & Northeastern R. Co.* v. *Gutierrez*, 215 U.S. 87, 96 (1909). The standard for determining the severability of an unconstitutional provision is well established: " 'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.' " *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976) (per curiam), quoting *Champlin Refining Co.* v. *Corporation Comm'n of Oklahoma*, 286 U.S. 210, 234 (1932). Accord: *Regan* v. *Time, Inc.*, 468 U.S., at 653; *INS* v. *Chadha*, 462 U.S., at 931-932; *United States* v. *Jackson*, 390 U.S. 570, 585 (1968).

Contrary to petitioners' contention (Pet. 15-18), the district court and court of appeals applied these established principles and concluded, after a review of the legislative history (Pet. App. 8a-12a, 23a-27a), that petitioners had not shown that it was "evident" that Congress would have declined to enact the alternative pay plan provisions without the legislative veto. See *id.* at 9a, 10a, 24a. In so holding, the courts below discussed and followed this Court's decision in *Chadha* and the D.C. Circuit's decision in *Alaska Airlines*, which has since been unanimously affirmed by this Court. There is no reason for the Court to

review the application of settled principles and this Court's precedents to the particular statutory scheme at issue here.

b. In any event, the conclusion of the courts below that the legislative veto provision is severable from the remainder of the Pay Act is correct. As petitioners acknowledge (Pet. 20-21), the Pay Act was essentially the work of the Conference Committee, which did not adopt the approach of the bills passed by either the House or the Senate. See H.R. Conf. Rep. 91-1685, 91st Cong., 2d Sess. 14 (1970); H.R. Rep. 91-480, 91st Cong., 1st Sess. 9-10 (1969); S. Rep. 91-582, 91st Cong., 1st Sess. 4-5 (1969). With respect to the provisions at issue here, the Conference Committee adopted a paysetting mechanism that had been proposed by the Administration and embodied in H.R. 18603, 91st Cong., 2d Sess. (1970), on which extensive hearings were held in the House in July 1970. See *Compensation in the Federal Classified Salary System: Hearings on H.R. 18403 and H.R. 18603 Before the Subcomm. on Compensation of the House Comm. on Post Office and Civil Service*, 91st Cong., 1st Sess. 41-43 (1970) (*Hearings*). Administration witnesses emphasized the importance of the alternative pay provision in affording flexibility in times of emergency or economic distress, without the need for Congress to resort to the legislative process when it was determined that the Nation could not afford full comparability increases. *Id.* at 56, 62, 75-76. The provision for an alternative pay plan also was recognized by other witnesses as one of the critical differences between the Administration's bill and a competing bill (H.R. 18403, 91st Cong., 2d Sess. (1970)) which also was under consideration by the Committee. *Hearings*, at 123, 124, 164, 167.

The debate on the bill reported by the Conference Committee, which incorporated the Administration's proposal, likewise reflected the importance attached to the alternative pay plan provisions. Petitioners of course are cor-

rect in their observation (Pet. 20-22) that the debates reflect the view that pay comparability was an important objective of the Pay Act. But that observation scarcely establishes that Congress intended the *alternative* pay provisions that it included in the same Act to be rendered null and void if the legislative veto device attached to those provisions were found to be unconstitutional. As the court of appeals observed, "Congress was unwilling to apply the principle of full comparability automatically without some mechanism for limiting pay adjustments during periods of economic hardship" (Pet. App. 25a). Thus, in a passage quoted by the court of appeals (*ibid.*), Senator McGee stated (116 Cong. Rec. 44103 (1970) (emphasis added)):

> It was our feeling that comparability should be arrived at as a judgment in a far more scientific way than we have been prone to do up until now, and that in arriving at what is comparability, we have essentially removed the need for any critical serious judgment factor *except in a national crisis of some sort, including an inflationary crisis, in which there is that reserve for the President of the United States.*

Other Members of Congress likewise stressed that the alternative pay plan proposal would provide an opportunity for flexibility and the exercise of tempering judgment in an otherwise automatic and scientific process. See generally 116 Cong. Rec. 44099-44102 (1970); *id.* at 44107 (remarks of Sen. Ellender); *id.* at 44284-44286 (remarks of Rep. Udall). Still other Members discussed the role of the alternative pay plan provision without questioning the need to include it in the Act. See *id.* at 44097 (statement of Sen. Fong); *id.* at 44288 (remarks of Rep. Hogan); *id.* at 44290 (remarks of Rep. Dulski).

As both courts below recognized (Pet. App. 12a, 26a), the severability of the legislative veto provision from the remainder of the alternative pay plan section is further

supported by Congress's recognition of the consequences of an actual exercise of the veto. Much of the criticism of the alternative pay plan was that if one House vetoed the President's submission, the presumably more unacceptable alternative of a full comparability adjustment that had been recommended by the President's pay agent but rejected by the President himself would automatically go into effect. The consistent response to this criticism was that if Congress did not like the President's alternative and also was unwilling to accept the higher automatic increase, it retained the option of passing a new law prescribing a particular pay increase. See generally 116 Cong. Rec. 44100, 44101-44102, 44104-44105 (1970). Representative Udall also recognized that Congress's ultimate means of control in this area was through the enactment of legislation. He stated that he wanted to "try [the Pay Act system] around the track for a couple of years, to see if it works," and he stressed that Congress could repeal the Pay Act "if it does not work, if the President is going to abuse his power" (*id.* at 44284).

Thus, Congress recognized and accepted the distinct possibility that it would be necessary to enact a law prescribing a particular pay increase in a future fiscal year if the President's alternative pay plan was unacceptable. That, of course, was the manner in which the Pay Act could have been expected to operate if the legislative veto provision were later to be held unconstitutional and severable. For this reason, not only is the alternative pay plan provision "fully operative as a law" without the legislative veto provision (*Alaska Airlines*, slip op. 5; *Chadha*, 462 U.S. at 931-932); "the statute will function in a *manner* consistent with the intent of Congress" if the legislative veto provision is severed (*Alaska Airlines*, slip op. 6 (emphasis in original)).[4] In fact, the Pay Act has

[4] Furthermore, even without the legislative veto provision, the waiting period in 5 U.S.C. 5305(c)(2) is fully operative as a law. As a

been fully operative in this manner since the legislative veto device was held unconstitutional in *Chadha*. For every fiscal year since *Chadha* was decided, Congress has either accepted the President's alternative pay plan or has prescribed a specific pay adjustment through the enactment of a new law. See pages 15-19, *infra*.

Finally, as both courts below also observed (Pet. App. 11a, 25a), the legislative history indicates that, even without the legislative veto device, Congress would not have enacted a comprehensive mechanism for pay adjustments for federal employees without providing an important role for the President. Yet if the alternative pay plan authority were to be excised along with the legislative veto provision, "the President's role would be reduced to merely a ministerial function of reporting to Congress the recommendations of his Pay Agent and the Advisory Committee on Federal Pay" (*id.* at 11a). Accordingly, "it is likely that a substantial number of members of Congress would not have voted for the Pay Act" if it did not contain the alternative pay plan provisions (Pet. App. 25a, citing 116 Cong. Rec. 44283 (1970) (remarks of Reps. Ford and Udall); *id.* at 44105 (remarks of Sen. McGee)). In that event, of course, Congress likewise would not have enacted the comparability pay provisions that petitioners seek to invoke in this case.[5]

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result, under Section 5305(c)(2), the President's alternative pay plan does not take effect until the expiration of 30 calendar days of continuous session of Congress after the date on which it is transmitted by the President to Congress, during which period Congress may reject that plan through the enactment of a law. This "report and wait" provision affords Congress an important opportunity to assure itself that the President's actions under the Pay Act are consistent with the assignment of authority to the President under the Pay Act and with the budgetary and other views of Congress. See *Alaska Airlines*, slip op. 11 & n.12; *Chadha*, 462 U.S. at 935 n.9; *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 15 (1941).

[5] Petitioners cite (Pet. 22-23) instances in the legislative history in which Members referred to the legislative veto provision in connection

In sum, as the district court observed, the legislative history establishes that the alternative pay plan was "an important 'safety valve' " and is therefore "an integral part of the comprehensive scheme for setting federal employees' salaries" (Pet. App. 11a). Petitioners in fact conceded that it is "self-evident" that "Congress wanted to provide the possibility of an alternative to pay comparability" (Pet. 25). And petitioners further concede that the question "[w]hether Congress would have provided federal employees with pay comparability in the absence of an alternative pay provision" is "obviously pertinent" to the severability issue (Pet. 16). Against this background, the district court and court of appeals correctly concluded that petitioners had failed to carry their burden of establishing that it was "evident" that Congress would not have enacted the alternative pay plan provisions if it had known that the legislative veto device was unconstitutional.

2. Even if petitioners' severability argument had merit as an original matter, however, they would not be entitled to relief in this case.

a. To begin with, the decision in *Chadha* should not affect the alternative pay plans for fiscal years 1980, 1981, and 1983, because each of those plans was formally placed in effect by Executive Order of the President prior to June 23, 1983, the date of this Court's decision in *Chadha*. See

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with the alternative pay plan section. Those statements for the most part reflect nothing more than an accurate description of the statutory scheme and how it would operate if the legislative veto device were ever invoked by Congress under the Pay Act (which it never was). They therefore add little to the fact that the legislative veto device was included in the statutory scheme as enacted. In particular, the statements upon which petitioners rely do not demonstrate that Congress would have preferred no alternative pay plan provision at all if—contrary to the Members' apparent assumption at the time they made the remarks—the legislative veto device were later held unconstitutional.

Pet. App. 4a-5a. Before being placed in effect, each plan was submitted to Congress pursuant to 5 U.S.C. 5305(c), and neither House of Congress exercised its authority to disapprove the plan. There is not the slightest reason to think that Congress would have wanted a court now to invalidate pay plans that have already become effective, merely because of the presence of a since-invalidated legislative veto provision that Congress did not choose to exercise during the period it itself prescribed. This case is in this respect unlike *Chadha*, where one House of Congress actually exercised the legislative veto authority, and the question was whether the Executive action should be sustained despite its *failure* to become effective under the statutory procedure.

The three relevant considerations bearing on the question of retroactive application of judicial decisions under *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107 (1971), further support the conclusion that *Chadha* should not be applied retroactively to invalidate the alternative pay plans for fiscal years 1980, 1981 and 1983. See also *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982) (opinion of Brennan, J.). First, the Court in *Chadha* decided an issue of first impression whose resolution was not clearly foreshadowed by earlier decisions of this Court. Second, retroactive application of *Chadha* to the plans for the three years at issue plainly is not necessary to further the operation of that decision, since, unlike in *Chadha* itself, neither House actually exercised the veto authority and accordingly no one was injured by unconstitutional action. Third, retroactive application of *Chadha* would produce "substantial inequitable results" (*Northern Pipeline*, 458 U.S. at 88). Budgetary planning for those years went forward and personnel were paid on the assumption that the alternative pay plans had been validly placed in effect. By the same token, retroactive increases in pay for those years (and

perhaps for subsequent years, to account for the higher base to which subsequent adjustments would have been added) would result in a substantial windfall for employees, who could have had no reasonable expectation that they would receive those greater amounts.

3. Furthermore, in laws passed by Congress since *Chadha* was decided, Congress has unambiguously approved both the alternative pay plans for the four fiscal years at issue in this case (including the post-*Chadha* plan for fiscal year 1985) and the President's continued submission of alternative pay plans generally.

a. The first relevant statutory provision is Section 202(a)(1) of the Omnibus Budget Reconciliation Act of 1983, Pub. L. No. 98-270, 98 Stat. 158, which provided:

> Notwithstanding any other provision of law, in the case of fiscal year 1984, the overall percentage of the adjustment under section 5305 of title 5, United States Code, in the rates of pay under the General Schedule, and in the rates of pay under the other statutory pay systems, shall be an increase of 4 percent.

This statutorily prescribed increase was in lieu of a 3.5% increase in the President's alternative pay plan for fiscal year 1984. See Federal Civilian Pay Increases, 19 Weekly Comp. Pres. Doc. 1190 (Aug. 31, 1983).

As the court of appeals observed (Pet. App. 26a-27a), the legislative history of this Act demonstrates that Congress was fully aware of the *Chadha* decision and its possible impact on the alternative pay plan mechanism. See H.R. Rep. 98-425, 98th Cong., 2d Sess. 5-7 (1984). But instead of eliminating the alternative pay plan authority altogether, in light of *Chadha,* Congress chose to enact narrower legislation that overrode the President's alternative plan only for the particular fiscal year in question. Congress therefore fulfilled the prophecy of supporters of the Pay Act during the 1970 congressional debates, that Congress would be prepared to enact new legislation

(rather than to rely on the one-House veto alone) if it disapproved of the President's alternative proposal. See page 11, *supra*.

Significantly, moreover, the House Report on the 1983 Act noted that Presidents in the past had "made extensive use of the alternative plan authority" and that "a full comparability adjustment had not been made since October 1977, with the result that Federal pay now lags more than 20 percent behind 'comparability' as envisioned by the 1970 Act." H.R. Rep. 98-425, *supra*, at 5. Nevertheless, the four percent increase prescribed by statute for fiscal year 1984 was obviously intended to be added on top of the pay rates as they then existed by virtue of the President's alternative pay plans for the preceding years, not, as petitioners urge in this case, the higher rates that would be required if the adjustment for fiscal years 1980, 1981 and 1983 were to be calculated according to comparability levels. The Omnibus Reconciliation Act for fiscal year 1983 therefore constitutes a clear ratification by Congress of the pay rates as they had been adjusted in preceding years. For this reason, even if petitioners' severability analysis were correct, the courts below would have no authority to order higher pay rates for fiscal years 1980, 1981 and 1983 on a retroactive basis.

b. The remaining alternative pay plan petitioners have challenged in this case is that for fiscal year 1985. But Congress has also ratified that adjustment, when it enacted Title II of the Supplemental Appropriations Act, 1985, Pub. L. No. 99-88, 99 Stat. 363. That Title, which is captioned "Increased Pay Costs For The Fiscal Year 1985", makes available to numerous federal agencies "additional amounts for appropriations for the fiscal year 1985, *for increased pay costs authorized by or pursuant to law*" (*ibid.* (emphasis added)). The House Report notes that among the pay increases to be funded out of this sup-

plemental appropriation were the "[c]ivilian and military pay raises [that] were made effective in January 1985 under Executive Order No. 12496." H.R. Rep. 99-142, 99th Cong., 1st Sess. 141 (1985). Executive Order 12496 was the order by which the President placed in effect the alternative pay plan for fiscal year 1985, pursuant to 5 U.S.C. 5305(c), and indeed the House Report notes that the Executive Order "was issued pursuant to [inter alia] Pub. L. No. 91-656," which is the Pay Act. See H.R. Rep. 99-142, *supra*, at 141. Congress therefore ratified the pay increase for fiscal year 1985 when it enacted the Supplemental Appropriations Act for that year. More generally, the statements in both the Act itself and the House Report that the funded pay increases were accomplished as "authorized by" and "pursuant to" law, including the Pay Act, are an affirmative congressional recognition of the President's continued use of the alternative pay plan authority.

c. The pattern of congressional action has continued in subsequent years. For example, in Section 15201(a)(1) of the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 332, Congress provided that the rates of pay under the General Schedule and other pay systems "shall not be adjusted under section 5305 of [Title 5] during fiscal year 1986." Congress thus froze the then-existing pay rates, which of course had been arrived at over the years by the very alternative pay plans that petitioners challenge in this case (except where Congress enacted a law that overrode the President's alternative plans).

Moreover, in Section 15201(a)(2) of the same Act, Congress specified that "the President shall provide for the adjustment of rates of pay under section 5305 of title 5, United States Code, as appropriate to reduce outlays, relating to pay of officers and employees of the Federal

Government, by at least $746,000,000 in fiscal year 1987 and $1,264,000,000 in fiscal year 1988" (100 Stat. 332). The President obviously was expected to comply with this directive through the alternative pay plan authority, since federal pay continued to lag behind comparability and full comparability adjustments would have required an increase, not a reduction, in outlays. See H.R. Doc. 99-262, 99th Cong., 2d Sess. 1 (1986) (President's alternative pay plan for fiscal 1987). The Senate Report confirms this interpretation, stating that the Act does not mandate a pay raise "but rather retains the current process for determining annual increases through the Pay Comparability Act, *Presidential alternative pay proposals* and subsequent Congressional action." S. Rep. 99-146, 99th Cong., 1st Sess. 432 (1985) (emphasis added).

Finally, in Section 144(a) of the Continuing Appropriations Act for Fiscal Year 1987, Pub. L. No. 99-591, 100 Stat. 3341-3353, Congress enacted a three percent pay increase for federal employees, in lieu of the President's alternative plan of four percent for military personnel and 2% for civilian personnel. H.R. Conf. Rep. 99-1005, 99th Cong., 2d Sess. 785 (1986). This statutorily specified pay adjustment presents yet another insurmountable obstacle to the court-ordered increases for preceding years that petitioners seek, and once again demonstrates that Congress is prepared to enact legislation to supersede an alternative pay plan of the President with which it disagrees.

d. This consistent course of action by Congress and the President, which rests on the assumption that the President's alternative pay plan for a particular fiscal year is valid unless overturned by Congress, demonstrates that petitioners would not be entitled to a retroactive increase in the rates of pay for fiscal years 1980, 1981, 1983 and 1985 even if their argument regarding the severability of the legislative veto provision were correct as an original

matter. There accordingly is no reason for this Court to review the severability ruling by the courts below.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

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[6] Petitioners' remaining argument (Pet. 10-15)—that the alternative pay plan authority is an unconstitutional delegation of legislative power—is insubstantial and was correctly rejected by the court of appeals in an analysis upon which we largely rely (Pet. App. 21a-23a). That issue does not warrant extensive discussion here, in light of Congress's ratification of the pay adjustments for the four fiscal years at issue.

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No. 86-1349

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

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AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, *et al.*,

Petitioners,

v.

RONALD REAGAN, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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REPLY MEMORANDUM FOR PETITIONERS

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TABLE OF AUTHORITIES

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REPLY MEMORANDUM FOR PETITIONERS

We submit this reply memorandum to respond to certain erroneous contentions made by the government.

1. Contrary to the government's assertion, the court of appeals' decision is not consistent with this Court's recent decision in *Alaska Airlines, Inc. v. Brock*, 55 U.S.L.W. 4396, —— U.S. —— (March 25, 1987). In *Alaska Airlines*, this Court held that the unconstitutional legislative veto provision in the Airline Deregulation Act of 1978 was severable from provisions of the Act which

gave "first hire" protection to airline employees who suffered dislocation as a result of deregulation. The Court's analysis in *Alaska Airlines* is helpful to petitioners' position in several ways.

a. First, the Court's decision explicitly recognizes a point central to the Unions' contention that, absent the check of the Pay Act's legislative veto, the President's alternative pay plan authority is an unconstitutional delegation of legislative authority. We have stressed that, in the wake of *INS v. Chadha*, 462 U.S. 919 (1983), close scrutiny must be given to broad delegations of congressional authority made in statutes containing the now unconstitutional legislative veto (Pet. 7, 11). The Court's *Alaska Airlines* decision instructs that:

> it is necessary to recognize that the absence of the veto necessarily alters the balance of powers between the Legislative and Executive Branches of the Federal Government. Thus, it is not only appropriate to evaluate the importance of the veto in the original legislative bargain, but also to consider the nature of the delegated authority that Congress made subject to a veto. Some delegations of power to the Executive . . . may have been so controversial or so broad that Congress would have been unwilling to make the delegation without a strong oversight mechanism.

55 U.S.L.W. at 4398.

The Court's observation is especially pertinent for the instant case. As we have argued, the absence of the veto has dramatically altered the scheme of the Pay Act and has created an unchecked—and unconstitutional—imbalance of power between Congress and the President. Without the veto, the Pay Act's alternative pay provision now gives the President unguided unilateral authority to set federal pay at whatever level he chooses (see Pet. 10-15).

The government asserts that the alternative pay provision, without the legislative veto, is not an unconstitu-

tional delegation of legislative authority because Congress has ratified the alternative plans for the years in question (Resp. br. 19, n.6). As we show below, no such ratification has occurred. Even if Congress had ratified those specific plans by passing legislation, that, of course, would fail to cure the delegation defect that still remains in the Pay Act.

b. The Court's reasoning, in *Alaska Airlines*, as to why the employee protections provision of the Airline Deregulation Act should survive the absence of the legislative veto provision is also instructive for resolution of the severability issue in the instant case.

The legislative veto provision at issue in *Alaska Airlines* governed issuance of Labor Department regulations regarding the administration of the Deregulation Act's employee protection provisions. In severing the veto from the Deregulation Act, the Court pointed to the detailed affirmative duty the statute's "first hire" provision imposed on air carriers. As the Court noted, the effectuation of these provisions "scarcely" needed the administrative regulations that the Secretary of Labor would issue. *Id.*, at 4399.

Describing the Secretary's role in the statutory scheme as "ancillary" and "subsidiary," the Court stated that the veto provision would therefore affect only "relatively insignificant action" the Secretary might take. *Id.* Given the fact that there was "little of substance" subject to the veto, the Court inferred that Congress would have been satisfied with the duty-to-hire provision even without the veto power. In further support of this conclusion, the Court noted that the legislative history of the Deregulation Act revealed that Congress considered employee protection to be a critical feature of the Act, while it paid scant attention to the legislative-veto provision. *Id.*, at 4400-4401.

In marked contrast to *Alaska Airlines*, it cannot be said that the Pay Act's scheme left "little of substance to be subject to a veto." Here, the veto is explicitly linked to the President's alternative pay plan authority. Because the exercise of the alternative pay plan option is, by definition, at odds with the central purpose of the Pay Act—pay comparability—the pivotal importance of the veto can hardly be doubted.[1] Where, as here, the alternative pay plan provision represents an exception to the Act's policy of pay comparability, it is clear that, without the check of the veto, the Pay Act cannot now function "in a *manner* consistent with the intent . . ." of the 1970 Congress that enacted the Pay Act. *Id.*, at 4398 (emphasis added).

2. The government's mischaracterization of the Pay Act's legislative history requires a response.

First, the government unsuccessfully attempts to establish that the alternative pay plan provision was an integral element of the Pay Act. Examination of the legislative debates reveals that no member of Congress mentioned the provision except in passing. When the alternative pay provision was mentioned it was always noted that it was subject to the one-House veto (see Pet. 22-23). For example, Rep. Udall, the key architect of the Pay Act, stated that "[p]art and parcel to the alternative plan procedure is the congressional review procedure." 116 Cong. Rec. 44285. Moreover, the government can point to no member of Congress who cited the alternative pay provision as a reason for his or her support of the Pay Act.[2]

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[1] As we have described (Pet. 22), the alternative pay plan provision actually received little congressional attention; Congress' central focus was on establishing a statutory procedure for automatic, annual comparability pay adjustments for federal employees.

[2] The government is left to rely on the hearings testimony of certain "Administration witnesses." (Resp. br. 9). We note that, as a general matter, the views of Administration spokesmen shed little

Second, the government asserts that if the legislative veto alone is severed, the Act will still function in a manner consistent with the intent of Congress because Congress can always enact a new law overriding the President's alternative plan (Resp. br. 10-11). The government cites legislative history in which some members recognized the potential need to enact new legislation in a particular fiscal year where Congress was unhappy with the President's alternative plan proposal and also wanted something less than a full comparability increase (Resp. br. 11). But, contrary to the government's suggestion, Congress *never* contemplated that it would have to pass new legislation to achieve the very thing the Pay Act was designed to accomplish: pay comparability (see Pet. 24, n.23).

Finally, the government contends that if the alternative pay provision were excised, the President's role in the Pay Act's scheme would be merely ministerial; the government, citing legislative history, states that many members of Congress would not have voted for the Pay Act if it had not given the President alternative pay authority (Resp. br. 12). But, as we have explained (Pet. 26-27), what that legislative history actually reveals is that some members of Congress wanted to ensure the President some role in the paysetting process (*see e.g.*, 116 Cong. Rec. 44283-85) and that this concern was met

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light on the views of the Congress. In any event, the testimony of the witnesses in question is consistent with our view of the legislative history. These spokesmen did not suggest that they supported an alternative pay provision without a legislative veto; indeed, they recognized that the President's exercise of his authority under the alternative pay plan provision was subject to the check of the veto. *Compensation in the Federal Classified Salary System: Hearings on H.R. 18403 and H.R. 18603 Before the Subcomm. on Compensation of the Committee on Post Office and Civil Service*, 91st Cong. 2d Sess. 2, 56, 75 (testimony of Robert Hampton, Chairman, Civil Service Commission and Arnold Weber, Associate Director, Office of Management and Budget).

by including the President in the preparing of the pay comparability report and the implementing of the pay adjustment.[3]

3. Apparently recognizing the weakness of its severability argument, the government argues, for the first time in this litigation, that, even if petitioners' position regarding the severability issue is correct, no relief is available to the Unions. Specifically, the government maintains that Congress has, through enactment of several appropriations measures, "ratified" the President's alternative pay plans for the four fiscal years in question. The government's argument misses the mark for several reasons.

First, the government's argument ignores that, apart from their claims for back pay, the Unions also seek declaratory relief from the continued unlawful operation of the Pay Act's alternative pay provision (see *e.g.*, NTEU Second Amended Complaint; J.A. 40). The al-

[3] The government characterizes as "concessions" (Resp. br. 13) two statements made in our petition. First, the government asserts that we have "conceded" (*id.*) that it is self-evident that Congress wanted to provide the possibility of an alternative to pay comparability. Of course, our observation is hardly remarkable given the existence of the alternative pay provision in the act. But, as this Court's analysis in *Alaska Airlines* demonstrates, the mere existence of the provision in the Act hardly answers the question of whether Congress viewed it as integral to the Act's scheme.

The government additionally indicates that we "concede" that whether Congress would have legislated full pay comparability without the alternative pay provision is pertinent to this case (Resp. br. 13; Pet. 16-17). Our statement was made in the context of criticizing the court of appeals' severability analysis. Of course, the question of whether Congress would have enacted comparability without *some* alternative plan provision is relevant to whether any part of the Pay Act should remain if both the legislative veto and alternative plan authority are stricken. But a critical flaw in the court of appeals' decision is that it did not focus on whether Congress would have adopted the *Act's* alternative pay provision without the check of the veto.

ternative pay provision remains in place as operative law and has now been implemented four times since 1980. In the absence of repeal or substantive amendment of that provision of the Act, the Unions are certainly entitled—and we do not understand the government to argue otherwise—to an adjudication of their claim for prospective relief from the illegal alternative pay provision.

Nor is the government correct that Congress has "ratified" the alternative pay plans for the years in question. For example, with regard to the alternative plan for fiscal year 1985—the only plan challenged by petitioner National Treasury Employees Union—the government maintains that Congress ratified the plan when it enacted Title II of the Supplemental Appropriations Act of 1985, Pub. L. No. 99-88, 99 Stat. 363. That statute simply made available to certain federal agencies monies needed for federal pay raises that became effective in January, 1985, pursuant to the President's alternative pay plan for that fiscal year. The government deduces, from enactment of the 1985 appropriations measure, that Congress meant to "ratify" the pay increase effected by the President's alternative pay plan.

It is now well established that the mere appropriation of funds does not constitute ratification. *Ex parte Endo*, 323 U.S. 283, 303 n.24 (1944). As one court of appeals has stated, "[r]atification by appropriation will not be found unless the government has sustained 'the heavy burden of demonstrating congressional knowledge of the precise course of action alleged to have been acquiesced in.'" *Rincon Band of Mission Indians v. Harris*, 618 F.2d 569, 573 (9th Cir. 1980), quoting *City of Santa Clara v. Andrus*, 572 F.2d 660, 672 (9th Cir. 1978), *cert. denied*, 439 U.S. 859 (1978). The "appropriation must plainly show a purpose to bestow the precise authority which is claimed." *Ex parte Endo, supra*, 323 U.S. at 303, n.24.

The government obviously has not met its "heavy burden" here. The 1985 appropriations statute clearly falls far short of demonstrating that Congress specifically endorsed as satisfactory either the 1985 pay increases or the President's use of the alternative plan authority. While the 1985 statute made necessary funds available, it simply never addressed the merits of the pay increase and it certainly did not sanction the President's now unilateral authority to set federal pay through the alternative pay provision. The fact that the accompanying House Report adverts to the Executive Order, implementing the 1985 pay increases, obviously does not even show that the committee, much less the Congress as a whole, considered or approved the President's use of the alternative pay authority.

The government additionally contends that a budget authorization measure for fiscal year 1986 and an appropriations enactment for fiscal year 1987 demonstrate implicit approval of existing federal pay rates which have been determined, in part, by the alternative pay plans under challenge. But all those statutes show is how Congress chose to address federal pay for those particular fiscal years; those measures obviously fail to demonstrate any conscious decision to endorse retroactively the pay plans in question.[4] For similar reasons,

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[4] The government further suggests (Resp. br. 17-18) that section 15201(a)(2) of the Consolidated Omnibus Budget Reconciliation Act of 1985 ratifies continued submission of alternative pay plans. But the statutory language cited by the government simply does not speak to the critical question of whether Congress actually intended to ratify a re-constituted Pay Act that now gives the President unilateral authority to set federal pay through issuance of alternative plans. Indeed, even the accompanying Senate Report, on which the government heavily relies, describes the pay-setting process as including "Presidential alternative pay *proposals and subsequent Congressional action.*" S. Rep. 99-146, 99th Cong., 1st Sess. 432 (1985) (emphasis added). That committee language hardly amounts

the government cannot convincingly argue that the Omnibus Budget Reconciliation Act of 1983 ratified the pay adjustments made through the alternative pay plans for fiscal years 1980, 1981 and 1982.[5]

Finally, we note that considering the current state of the Pay Act—that the legislative veto is unconstitutional, but the President continues to use the alternative plan authority to set pay at whatever level he chooses—Congress can do little more than appropriate the full amount the President recommends. To provide more would require a veto-proof majority in Congress. The delicate balance between the branches of government has therefore been upset to such a degree that if the Congress wants comparability in a given year, it needs a supermajority to re-legislate that which it already enacted in 1970. Viewed against this backdrop, the government's suggestion that Congress has ratified the President's alternative plan authority is particularly unpersuasive.

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to an endorsement of the President's unilateral power to set pay under the Pay Act; to the contrary it describes the President's role as that of only proposing pay alternatives.

[5] We note also the government's argument that *Chadha* should not be applied retroactively to affect the alternative pay plans for fiscal years 1980, 1981 and 1983, which are challenged by petitioner American Federation of Government Employees. On balance, the factors relevant to the issue of retroactivity weigh in favor of retrospective application. First, considerable doubt existed prior to *Chadha* with respect to the constitutionality of legislative veto provisions. See *Alaska Airlines Inc. v. Donovan*, 766 F.2d 1550, 1557 (D.C. Cir. 1985). Second, no substantial inequitable results would follow from retroactive application. While budgetary planning for the years in question may have been based on the assumption of the validity of the alternative plans, that does not justify depriving employees of pay that was denied them by unconstitutional means. Finally, the holding of *Chadha* would be furthered by retroactive application. If, as we argue, the alternative pay provision is inextricably connected to the legislative veto, it hardly seems a vindication of *Chadha* to allow that provision to be effective for the years at issue.

For the reasons stated above, and in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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